TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

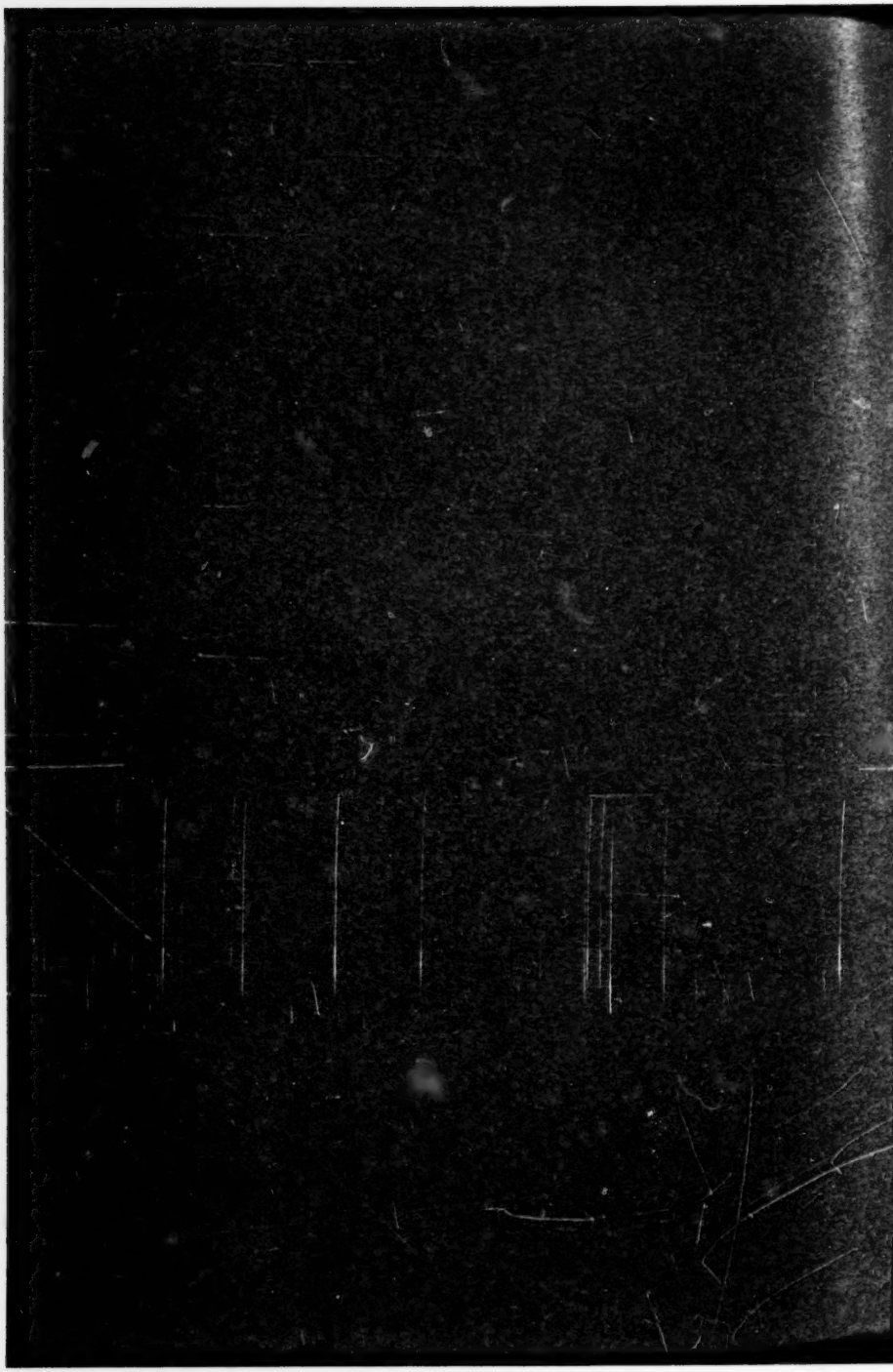
No. 192.

THE GERMAN NATIONAL BANK ET AL. APPELLANTS,

vs.

[illegible] SPECKERT, JACOB TRAEGER, HARRIET TRAEGER, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF [illegible] AND THE SIXTH DISTRICT.



(17,622.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 508.

THE GERMAN NATIONAL BANK ET AL., APPELLANTS,

vs.

A. J. SPECKERT, JACOB FRANKEL, HARRIET FRANKEL, ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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1 *Transcript of Record.*

Proceedings of the circuit court of the United States for the district of Kentucky, at a regular term begun and held at the Federal court hall, in the city of Louisville, Ky., on Monday, October 3rd, 1898.

Present: Honorable John W. Barr, sitting as circuit judge.

A. J. SPECKERT ET AL.
vs.
GERMAN NATIONAL BANK, &c. } No. 6638.

Be it remembered, that heretofore, to wit, on the 4th day of October, A. D. 1897, came the defendant R. H. Courtney, receiver of the German national bank, by his attorneys, and filed a transcript of the record from the Jefferson circuit court, law and equity division, herein.

Thereupon said defendant entered his appearance herein and on his motion, it is ordered that the clerk do place this case upon the docket of this court and that it be tried here in its regular order.

Came the plaintiffs and cross-plaintiffs herein and moved the court to remand this case to the State court because the facts disclosed on the face of the transcript show that it is not a removable case under the statute, and that the motion to remove to this court was made too late.

Wherefore for these reasons and other reasons manifest on the face of the record, this cause should be remanded to the State court.

By consent of parties, it is ordered that said motion be set for hearing, November 13th, 1897.

2 The transcript above referred to is as follows:

STATE OF KENTUCKY, }
County of Jefferson. }

Pleas before the Honorable Sterling B. Tony, judge of the Jefferson circuit court, law and equity division, at the court-house, in the city of Louisville, county and State aforesaid.

A. J. SPECKERT, &c., Plaintiffs,
vs.
GERMAN NATIONAL BANK, &c., Defendants. } 4014.

Transcript of Record.

Be it remembered that heretofore, to wit, on the 4th day of April, 1894, came the plaintiffs, by D. W. Sanders, D. W. Baird, Dodd & Dodd, Mapherson & Bacon, attorneys, and filed their petition herein.

Said petition is in words and figures as follows, to wit:

Jefferson Circuit Court.

A. J. SPECKERT, JACOB FRANKEL, HARRIETT FRANKEL, LEWIS R. McCLEERY, W. E. GLOVER, W. L. LYONS, FRANK SPECKERT, AARON KOHN, JOHN UNZ, PHILLIP ACKERMAN, F. J. RENZ, ANDREW KREBS, Suing for Themselves and, as Having a Common Interest with Them, All the Stockholders of the Louisville Deposit Bank, Plaintiffs,

vs.

GERMAN NATIONAL BANK, ADOLPH REUTLINGER, ALBERT REUTLINGER, Moses Schwartz, Germania Safety Vault and Trust Company, as Assignee of the Louisville Deposit Bank, and The Louisville Deposit Bank, Defendants.

The plaintiffs, A. J. Speckert, Jacob Frankel, Harriett Frankel, Lewis R. McCleery, W. E. Glover, W. L. Lyons, Frank
3 Speckert, Aaron Kohn, John Unz, F. J. Renz, and Andrew Krebs, say that the defendant, The Louisville Deposit Bank is and was at the various times hereinafter mentioned, a corporation for banking purposes having its place of business in the city of Louisville, State of Kentucky, and incorporated by that name by an act of the General Assembly of said State entitled "An act to incorporate the Louisville deposit bank," approved March 30th, 1888, and thereby empowered to transact a general banking business, to contract and be contracted with, to sue and be sued: that the defendant, The German National Bank is and was, at the various times hereinafter mentioned, a corporation for banking purposes, having its principal place of business in the city of Louisville, duly incorporated and organized under an act of the Congress of the United States of America known as the "national bank act," and thereby empowered to do a general banking business, to contract and be contracted with, to sue and be sued; that the Germania Safety Vault & Trust Company is and was at the various times hereinafter mentioned, a corporation for the purposes of administering trusts, having its principal place of business in said city of Louisville, and incorporated by an act of the General Assembly of said State, entitled "An act to incorporate the Germania Safety Vault and Trust Company," approved Feb. 11th, 1888, and thereby empowered to administer trusts and become and act as assignee for the benefit of creditors, to contract and be contracted with, to sue and be sued; that the said plaintiffs, together with numerous other persons, were subscribers to the capital stock of said Louisville deposit bank; that the defendants Adolph Reutlinger and Albert Reutlinger are and at the various times hereinafter mentioned, were holders each of a large amount of the capital stock of the defendant, The German National Bank, and that the said Adolph Reutlinger then was and now is the president, and the said Albert Reutlinger then was and now is the assistant cashier of the said German national bank; that on or about the — day —— 1891, and prior to the 30th day of March, 1891, the defendants, said Adolph Reutlinger and Albert Reutlinger, and the said Moses Schwartz, each

acting as officers as aforesaid, of the said German national bank, and for themselves individually, and the defendant, Moses Schwartz, unlawfully and fraudulently conspired and confederated together and entered into a fraudulent agreement and conspiracy, for the purpose of defrauding and wrongfully deceiving and cheating the plaintiffs herein and others, who might subscribe and who did afterwards, induced fraudulently by said unlawful combination
4 and conspiracy, subscribe to and pay into the Louisville deposit bank, as stockholders thereof, various sums of money, organize the Louisville deposit bank and obtain from plaintiffs and said various other persons, which sums of money for the stock of said Louisville deposit bank, aggregate the sum of $265,000, which was so obtained by the said defendants as aforesaid, for the use and benefit of the said German national bank and the said Adolph Reutlinger and Albert Reutlinger, and Moses Schwartz; that the said defendants, The German National Bank and the said Adolph Reutlinger and the said Albert Reutlinger and the said Moses Schwartz, unlawfully conspiring for the purpose as aforesaid, did falsely represent to these plaintiffs and to said other persons whom they solicited to subscribe for stock and to organize the Louisville deposit bank, that there was an opening in the city of Louisville for a new bank, that the said Moses Schwartz was a man of large means and influence, having an extensive acquaintance fitted and financially able to conduct successfully a banking business and that the said Moses Schwartz had been a customer of the said German national bank for a period of over fifteen years and a director of said bank as well as a stockholder thereof, and had conducted business with them during all of said time, and was one of their largest customers; that the said Schwartz had a running balance of $75,000 per month cash deposit with them; that he also had in New York to his credit a running balance of from $50,000 to $75,000; that he owed but little debts and had enough collateral in his possession to more than pay all his debts and that he was worth at least from two to three hundred thousand dollars above the payment of all his debts. And further falsely represented to these plaintiffs and to a number of said others, to induce them to subscribe for stock of the Louisville deposit bank that their object in getting up said bank was finally to consolidate the German national bank with the Louisville deposit bank under the charter which the German national bank and its president and assistant cashier had obtained from the General Assembly of Kentucky, under the name and title of the "German national bank," as they, the said Adolph Reutlinger and Albert Reutlinger had concluded to conduct no longer the banking business under the "national bank" system, and as the charter of the said German national bank expired in a short time, their object was to start this new bank with a view of finally consolidating their new bank with the German national bank under the title of the "German-American bank;" that in pursuance of said con-
5 spiracy, confederation and agreement the said Moses Schwartz did subscribe for $25,000 worth of stock at its par value of $100 per share, and the said Albert Reutlinger subscribed for

$15,000 worth of said stock and caused his brother, Rudolph E. Reutlinger, who was and now is the cashier of the German national bank, to subscribe for $10,000 worth thereof, and C. W. Kelly, one of the directors of said German national bank, also for $10,000 worth of said stock; and that the said Adolph Reutlinger and the said Albert Reutlinger and the said Moses Schwartz in pursuance of said conspiracy and confederacy, fraudulently solicited and procured these plaintiffs and various other persons to subscribe to the capital stock of the said Louisville deposit bank, and by the said fraudulent conspiracy, solicitations, misrepresentations and endeavors these plaintiffs were induced to subscribe and did subscribe for shares of stock, at their par value of $100 in the Louisville deposit bank respectively as follows:

Said A. J. Speckert	25 shares.	$2,500 00
Said Jacob Frankel	25 shares...	2,500 00
Said Harriett Frankel	25 shares..	2,500 00
Said L. R. McCleery.....	2 shares.....	200 00
Said W. E. Glover.....	3 shares..... ..	300 00
Said W. L. Lyons	25 shares....	2,500 00
Said Frank Speckert	20 shares.....	2,000 00
Said Aaron Kohn.....	100 shares.....	10,000 00
Said John Unz	10 shares.....	1,000 00
Said Phillip Ackerman...	10 shares.....	1,000 00
Said F. J. Renz.....	6 shares....	600 00
Said Andrew Krebs	10 shares..... ...	1,000 00

and various other persons subscribed to stock in the aggregate with the amounts subscribed by these plaintiffs to $265,000; and that said persons so subscribing, other than these plaintiffs, have a common interest in the subject-matter of this action, and the questions herein involved and that they are numerous, and that it is impracticable to bring all of them before the court within a reasonable time. The plaintiffs state that said false and fraudulent representations on the part of the defendants, Adolph Reutlinger and Albert Reutlinger and the German national bank and Moses Schwartz were falsely and fraudulently made for the sole purpose of defrauding plaintiffs and those in common interest with them for the use and benefit of the said German national bank, the said Adolph Reutlinger and Albert Reutlinger and the said Moses Schwartz,
6 and the said Adolph Reutlinger and Albert Reutlinger and the said German national bank and the said Moses Schwartz, well knew that at the said time the said Moses Schwartz was insolvent, and that he did not have any property or estate of any value, and that he was largely indebted, and that he and the said Adolph Reutlinger had been associated in various enterprises, and that the said Reutlingers well knew his financial condition; that he had been director of the German national bank and a director of the German National Insurance Company of which the said Adolph Reutlinger was and is the president and director of the said defendant, The Germania Safety Vault & Trust Company, of which the said Adolph Reutlinger was at that time the president, and had

been an officer with the said Adolph Reutlinger, in what is known as the American Semaphore Company; that the said Adolph Reutlinger and the said Moses Schwartz and the said Albert Reutlinger had purchased largely of the capital stock of a corporate organization known as the Oregon Gold Mining Company, and the said Moses Schwartz had subscribed thereto paying for over $30,000.00 worth of stock of the Oregon Gold Mining Company and over $10,000.00 worth of the bonds of said Oregon Gold Mining Company which then were held by the said German national bank and are now held by it; that in truth and in fact, as the said Adolph Reutlinger and Albert Reutlinger and Moses Schwartz and the German national bank well knew, at all these times, the said Moses Schwartz did not have and had not had a running account at the said German national bank a monthly deposit of $75,000.00 or any like sum or any approximation thereof, but on the contrary had in said bank discounted by said German national bank and with its officers commercial paper and other paper wholly worthless, and was at the time that they made said false and fraudulent representations, as aforesaid, indebted to the said German national bank in a sum exceeding $223,000 and was liable to said German national bank upon paper to said extent and that the said German national bank at said time held as security for said indebtedness as the said German national bank and the said Adolph Reutlinger, Albert Reutlinger and Moses Schwartz well knew, worthless paper, endorsed by insolvent persons, and collateral therefor, consisting of Oregon Gold Mining Company stock, semaphore stock, Southern oil stock and other stocks of like character, which had no value, and were almost, if not entirely, worthless; and that the said Adolph Reutlinger, Albert Reutlinger, the German national bank and the
7 said Moses Schwartz well knew the said Moses Schwartz did not have a running deposit in any New York bank of from $50,000.00 to $75,000.00, excepting as hereinafter stated, to wit: That between the first day of January, 1891, and the time of the actual organization of the Louisville deposit bank, the said Adolph Reutlinger in pursuance of said fraudulent conspiracy and agreement, the defendant, Albert Reutlinger and the said Moses Schwartz went to the city of New York, with a letter written by the said Adolph Reutlinger and signed by him addressed to W. J. Quinlan, as cashier of the Chemical national bank, at New York city, representing that the said Adolph Reutlinger could not come to New York with the said Schwartz, because of physical disability or sickness, but that he sent with the said Schwartz his son, Albert Reutlinger, assistant cashier, of the defendant, The German National Bank, for the purpose of introducing to the said bank the defendant, Moses Schwartz, as a man who had for a period of over seventeen years done business with the said German national bank and as a man of large means and varied business interests, and as a model of a man, and that the said Moses Schwartz's business had grown so much that the German national bank could not accommodate him for all his wants, and, therefore, as he desired to open an account in New York, that any courtesies shown him by the said bank would be appreci-

ated by him, the said Adolph Reutlinger, which letter was signed by him as president of The German National Bank, defendant herein as aforesaid, and that in pursuance of the conspiracy formed as aforesaid and for the purpose of enabling the said Schwartz to obtain a false and fictitious credit and thus to deceive and defraud the public and these plaintiffs, and those having as aforesaid a common interest with them, the said Albert Reutlinger and the said Moses Schwartz did go to New York and did go to the said bank and obtain from said bank and from the American Exchange National Bank of New York City, by means of the machinations of the said Adolph and Albert Reutlinger and the said Moses Schwartz and the said letter as aforesaid, and other letters of similar import, a credit by discounting a lot of paper to the said banks at New York, amounting to over eighty thousand dollars, which paper was of the same worthless character and kind as the paper which the said German national bank had theretofore held and which was endorsed by various persons who were insolvent, the paper having no value, and which they, the said defendants, Adolph Reutlinger and Albert Reutlinger and the said Moses Schwartz and the said German
8 National Bank, knew had no value and that the credit so obtained and carried along by the said banks in New York through the inducement and false representations by the defendants, The German National Bank, Albert Reutlinger and Adolph Reutlinger, and Moses Schwartz, upon said worthless paper which they knew to be worthless, and that credit and discount were obtained for the purpose of enabling the said Moses Schwartz to present to those whom the said defendants desired to induce to subscribe for stock in the Louisville deposit bank and to exhibit to them the pass book of the said New York banks, showing that he, the said Moses Schwartz, had upon deposit with the said New York banks a large sum of money, which said credit of said money was fraudulently obtained as aforesaid; and that at the said time the said Schwartz was insolvent, and the said banks at New York could not have realized but a very immaterial part of the money so loaned by said New York banks upon the securities which had been placed with them to induce the making of said loans and extending the credit of said Moses Schwartz, and that the said defendants, The German National Bank and the said Adolph Reutlinger and Albert Reutlinger used said means for the purpose of obtaining said subscriptions to said stock of the Louisville deposit bank, and to obtain the money of the plaintiffs and said others having a common interest with them as aforesaid for the purpose of enabling the said Moses Schwartz to take the money which was obtained from plaintiffs and others subscribing for stock in the said Louisville deposit bank and by means of discounting to said Louisville deposit bank paper equally as worthless as that upon which the said Moses Schwartz was indebted to the said German national bank with similar parties thereto, and to use the money obtained by said discounts in liquidation of the worthless claims which the said German national bank held against the said Moses Schwartz as aforesaid, and upon which he was liable, and that the said Moses Schwartz might pay the said money

so subscribed in pursuance of said conspiracy and fraudulent agreement to the said German national bank; and plaintiffs say that the said Moses Schwartz in pursuance of said conspiracy and fraudulent agreement, did, with the defendants, Albert Reutlinger and Adolph Reutlinger and the German national bank, organize the said Louisville deposit bank and obtain subscriptions from the plaintiffs, and from those having a common interest with them to the extent of $265,000.00 and did receive from such subscriptions that sum for the stock of the said Louisville deposit bank, and that the
9 said Moses Schwartz in pursuance of said conspiracy was by the procurement and machinations of the said German national bank, the said Adolph Reutlinger and the said Albert Reutlinger and the said Moses Schwartz elected president of the Louisville Deposit bank and the said Albert Reutlinger, had, in pursuance of said conspiracy and fraudulent agreement, agreed and represented that he would become the cashier of the Louisville Deposit bank; but afterwards, in pursuance of said conspiracy and fraudulent agreement and to more easily effect the objects and purposes thereof, one J. B. Ohligschlager, who had for a number of years and was, at the time of the organization of the Louisville Deposit bank, an officer of the German national bank, was made cashier of the said Louisville Deposit bank; and within a short time after the organization of the said Louisville Deposit bank and after the plaintiffs and those having a common interest with them had paid their money into said bank for their stock, the defendants, Albert Reutlinger and his brother, R. E. Reutlinger and the said C. W. Kelly, did not pay their subscriptions to the stock which they had subscribed to for the Louisville Deposit bank, but transferred the same to the said Moses Schwartz, who was then insolvent, and the said Moses Schwartz fraudulently paid for the same with the funds of the Louisville Deposit bank, which had been contributed by these plaintiffs, and those having a common interest with them as aforesaid; and the said Moses Schwartz, in pursuance of said conspiracy and fraudulent agreement, did, after the organization of the said Louisville Deposit bank and after he became the president thereof and obtained control thereof and of its funds and its management, in pursuance of said fraudulent agreement and of the machinations of himself and the said defendants, Adolph Reutlinger and Albert Reutlinger and the German National Bank, caused worthless paper, with himself and others who had been parties to the worthless paper held by the said German national bank and other parties thereto who were insolvent to be discounted to and the money obtained by him from the said Louisville Deposit bank, and did, therefor in that way, fraudulently pay to the said German national bank about $200,000.00 upon said worthless claims held by the said German national bank against Moses Schwartz; that the said Moses Schwartz, out of said money paid into said Louisville Deposit bank by these plaintiffs and those having a common interest with them for the capital stock of the said Louisville Deposit bank, and out of the funds of the said

Louisville Deposit bank, and the said Adolph Reutlinger, as
10 president of said German national bank, and the said Albert
Reutlinger, as assistant cashier of said bank, and the said German national bank did, in pursuance of said conspiracy and fraudulent agreement, receive said money from said Moses Schwartz, knowing it was the money of the Louisville Deposit bank contributed and paid into the Louisville Deposit bank by these plaintiffs and said other subscribers to said stock having a common interest with them as aforesaid, and in fraud of the rights of the said Louisville Deposit bank and of these plaintiffs and of the rights of all who had subscribed for the stock of the said Louisville Deposit bank.

That at the time the said defendants, Adolph Reutlinger and Albert Reutlinger and Moses Schwartz and the said German National Bank, were getting plaintiffs and said others having a common interest with them to subscribe and pay into the said Louisville Deposit bank for the stock of the Louisville Deposit bank, as aforesaid, and were causing the said Moses Schwartz to obtain false and fictitious credits in New York and other places, the said Moses Schwartz was indebted to the said German national bank in a sum exceeding $223,000.00 when the said Adolph Reutlinger, and the said Albert Reutlinger and the German Bank, defendants herein, well knew that under the law known as the "national bank act," they could not make loans to any one person exceeding ten per cent. of the amount of their capital stock and the capital stock of the said German national bank was $250,000.00; and in order to relieve the said German national bank of said indebtedness and lift the debts owing to it by the said defendant, Moses Schwartz, and transfer such indebtedness to the said Louisville Deposit bank and cause the loss to fall upon these plaintiffs and those united with them in interest as stockholders as aforesaid, and upon the said Louisville Deposit bank, the said Adolph Reutlinger, Albert Reutlinger and the said Moses Schwart- entered into the conspiracy as aforesaid and obtained the money of the plaintiffs and other persons who subscribed for the stock, for the benefit of themselves and said German national bank.

Plaintiffs say that by reason of the said conspiracy and fraudulent combination and agreement and machinations as aforesaid of the said defendants, Adolph Reutlinger, Albert Reutlinger and the said Moses Schwartz, and the said German National Bank, the Louisville Deposit bank was depleted to the extent aforesaid of its capital, and worthless paper and securities were given it in lieu
thereof, and that on the 25th day of July, 1893, by reason
11 thereof, it did suspend and made an assignment to the defendant, The Germania Safety Vault and Trust Company for the benefit of the creditors of the said Louisville Deposit bank; and that the said Germania Safety Vault and Trust Company duly qualified and now is acting as such trustee; and that these plaintiffs have duly notified the said assignee of the existence of the cause of action herein set up and all matters as aforesaid, and have made due demand of the defendant, the said Germania Safety Vault Com-

pany, that it should bring this action in behalf of the said Louisville Deposit bank against the said German national bank and the said Adolph Reutlinger and Albert Reutlinger and the said Moses Schwartz, and that the said Germania Safety Vault and Trust Company refused to bring said action and has failed to bring the same, and that these plaintiffs now bring the same for the benefit of the said Louisville Deposit bank, and for their own benefit, and for the benefit of all those having a common interest with them as stockholders of said bank as aforesaid.

The plaintiffs state that they and said others united with them in the interest as aforesaid, were ignorant of the true state of affairs as hereinbefore set forth, and of the financial condition and insolvency of the said Moses Schwartz and of the real and true condition of matters so falsely misrepresented, and of the falsity of the representations of the said Reutlingers and the said Moses Schwartz, and that a number of the plaintiffs were at the time depositors in said German national bank, and the said Adolph Reutlinger and Albert Reutlinger and the said Moses Schwartz, had pretended to them and to a number of said others to be their friends, and that these plaintiffs and said others ignorant of the true state of facts and of the real facts of the case, relied upon the false and fraudulent representations of said defendants wholly, the said Adolph Reutlinger and Albert Reutlinger having been bankers for many years and having great experience and having been intimately connected and associated with the said Moses Schwartz for a period of over fifteen years, and they, the said Adolph Reutlinger and Albert Reutlinger, knowing all about his, the said Schwartz's condition, and that these plaintiffs and said others relied upon the representations so made that he, the said Schwartz, was actually worth between two and three hundred thousand dollars over and above all his liabilities, and so relying upon said false and fraudulent misrepresentations of said defendants, these plaintiffs and said others subscribed to the stock of the said Louisville Deposit bank as aforesaid. Plain-
12 tiffs say that in order to induce the plaintiffs and said others to subscribe for stock of the Louisville Deposit bank, the said Moses Schwartz subscribed for a large amount of said stock, and the said Adolph Reutlinger and Albert Reutlinger represented that he had money at their bank to pay for the same, and the said Schwartz also produced and exhibited in their presence his accounts with the banks in New York, showing that he had to his credit between fifty and seventy thousand dollars, and that he was able to subscribe and pay for such a large sum and amount of stock, and that the said Albert Reutlinger and the said R. E. Reutlinger, and the members of the family of the said Adolph Reutlinger and some of the directors of the said German national bank were willing to subscribe for so large an amount of the capital stock of the said Louisville Deposit bank, operated as an inducement, and it was so intended to operate by said defendants in pursuance of said fraudulent conspiracy and agreement, and induced these plaintiffs and others to subscribe and pay for the stock of the Louisville Deposit bank as aforesaid, and that after the organization of the said Louisville De-

posit bank as aforesaid the said Albert Reutlinger and the said Adolph Reutlinger and other directors of the said German national bank, who had in this manner subscribed for said stock, turned over their said stock so subscribed for to the said Moses Schwartz, whom they knew to be wholly insolvent, and the said German national bank during the existence of the said Louisville Deposit bank and its officers, the said Adolph Reutlinger and the said Albert Reutlinger, in confederation and conspiracy with the said Moses Schwartz, did systematically and continuously unload upon the said Louisville Deposit bank the said worthless paper of the said Moses Schwartz and renewals of the same paper held by the German national bank, at the time of the organization of the said Louisville Deposit bank, and thereby fraudulently obtained for themselves and the said German national bank the money so contributed by these plaintiffs and others as aforesaid, from the said Louisville Deposit bank, being its capital, for the use and benefit of the said German national bank, and the said Adolph Reutlinger and Albert Reutlinger and the said Moses Schwartz.

Plaintiffs say that the false and fraudulent representations and the conspiracy and agreement, as aforesaid, to defraud the Louisville Deposit bank and its stockholders for the benefit of the said German national bank, and the said Moses Schwartz and the said Adolph Reutlinger and Albert Reutlinger, were made and
13 entered into by the said Schwartz and the said Reutlingers, with the intention that the said representations should be acted upon by these plaintiffs and others who should become stockholders of the Louisville Deposit bank, and were so acted upon by these plaintiffs and others who should become and did become stockholders therein and that in pursuance of said conspiracy and fraudulent agreement, the said Schwartz upon the organization of the said Louisville Deposit bank and their and his procurement of himself to be elected president thereof, began immediately to misappropriate the funds and securities of the said bank in payment of his indebtedness to the said German national bank, all the while colluding with the defendants, Adolph Reutlinger and Albert Reutlinger in pursuance of the fraudulent conspiracy and agreement as aforesaid; and that from the date of the organization of the said Louisville Deposit bank, and the election of the said Moses Schwartz as president, to the date of the assignment, as aforesaid, of the Louisville Deposit bank, he, the said Schwartz, in conspiracy and collusion with the said Reutlingers and said German national bank fraudulently diverted the money of the said deposit bank from its legitimate purposes to pay off his indebtedness to the said German national bank, and did pay off his said indebtedness in the same as aforesaid, which payments were made by taking from and misappropriating the funds and securities of the said Louisville Deposit bank either in actual money loaned by the said Schwartz to himself from the bank, or in improper securities, or by transfer of the securities of the said Louisville Deposit bank, to the said German national bank, and receiving worthless or greatly depreciated paper, and collaterals from the said German national bank in return.

Plaintiffs say that the assets of the said Louisville Deposit bank up to the time of its assignment, had been so depleted in pursuance of the conspiracy, fraudulent agreement and collusion of the said Adolph Reutlinger, Albert Reutlinger, Moses Schwartz and the said German national bank aforesaid that its assets assigned to the defendant The Germania Safety Vault and Trust Company will not suffice to pay but a very small portion of the claims upon said Louisville Deposit bank by its creditors, existing at the time of its assignment, and will pay nothing to its stockholders, and these plaintiffs and said other parties who subscribed to the stock of said Louisville Deposit bank, and were stockholders therein at the time of the assignment will lose entirely the amount so paid by them respectively.

14 Wherefore, plaintiffs suing for the said Louisville Deposit bank and for themselves and for said others *was* subscribed and paid for stock of the Louisville Deposit bank, pray that the said German national bank be called upon and made to render an account before the commissioner of said court of the money obtained as aforesaid, from the said Louisville Deposit bank, and for a judgment in behalf of the said Louisville Deposit bank against the said German national bank, and the said Adolph Reutlinger, Albert Reutlinger and Moses Schwartz, for the sum of $265,000.00 and costs hereof, and for all further and proper relief in the premises.

D. W. SANDERS,
BYRON BACON,
ERNEST MACPHERSON,
DODD & DODD,
D. W. BAIRD, *Att'ys for Pl'ff-.*

The affiant, Aaron Kohn, and A. J. Speckert, says he is one of the plaintiffs herein and the statements contained in the foregoing petition are true as he verily believes.

AARON KOHN.
A. J. SPECKERT.

Subscribed and sworn to before me by Aaron Kohn and A. J. Speckert this 4th day of April, 1894. My commission expires January 16, 1896.

SAM'L A. LEDERMAN,
N. P., Jeff. Co.

And thereupon the clerk issued summons and 6 copies which *is* as follows:

Jefferson Circuit Court.

The Commonwealth of Kentucky to the sheriff of Jefferson county, Greeting:

We command you to summon German National Bank, Adolph Reutlinger, Albert Reutlinger, Moses Schwartz, Germania Safety Vault and Trust Company, as assignee of the Louisville Deposit bank, and the Louisville Deposit Bank, to answer a petition filed

against them in our Jefferson circuit court, by A. J. Speckert, &c., No. 4014, and warn them that upon their failure so to do for twenty days after service hereof, if, in Jefferson county, or for thirty
15 days, if elsewhere in the State, judgment may be rendered by default, or answer compelled or proof taken at petitioner's option; and make due return hereof within sixty days from date hereof.

Witness, John S. Cain, clerk of said court, this 4th day of April, 1894.

JOHN S. CAIN, *Clerk*,
By E. WHITEHEAD, *D. C.*

The sheriff's return on said summons is as follows:

Came to hand April 5, 1894, at 2.00 p. m., executed April 6, 1894, on the German National Bank by delivering a copy of the within summons to Adolph Reutlinger, president of said company, he being chief officer found in this county, at this time. Executed April 6, 1894, *at* Adolph Reutlinger and Albert Reutlinger by delivering to each of them a copy of the within summons. Executed April 6, 1894, on the Germania Safety Vault & Trust Co., as assignee of the Louisville Deposit bank, by delivering a copy of the within summons to T. W. Spindle, president of said company, he being chief officer found in this county at this time. Moses Schwartz not found.

H. A. BELL, *B. J. C.*,
By W. B. THIXTON, *D. S.*

April 30th, 1894, set at rules by plaintiff.

At a court held on the 7th day of May, 1894, on motion of plaintiff-, by counsel, ordered by the court that this case be passed one week on the docket.

At a court held on the 14th day of May, 1894, on motion of plaintiffs-, by counsel, ordered by the court that this case be passed one week on the docket.

At a court held on the 21st day of May, 1894, on motion of plaintiff-, by counsel, it is ordered that this case be passed one week on the docket.

At a court held on the 28th day of May, 1894, on motion of plaintiffs, by counsel, it is ordered that this case be passed one week on the docket.

16 At a court held on the 4th day of June, 1894, on motion of plaintiffs, by counsel, it is ordered that this case be passed one week on the docket.

At a court held on the 11th day of June, 1894, on motion of plaintiff-, by counsel, it is ordered that this case be passed one week on the docket.

At a court held on the 18th day of June, 1894, on motion of plaintiff-, by counsel, it is ordered that this case be passed one week on the docket.

At a court held on the 25th day of June, 1894, on motion of plaintiff-, by counsel, it is ordered that this case be postponed until the 28th inst. for hearing.

At a court held on the 28th day of June, 1894, came defendants, by O'Neal and Humphrey & Davie, counsel, and moved the court to require the plaintiffs to elect which of the causes of action herein set up by them they will pursue to which the plaintiffs object. And said motion is assigned to July 2, 1894, for hearing.

At a court held on the 15th day of October, 1894, by consent of parties by counsel, ordered that this case be assigned to the 22nd inst., for hearing, on motion to elect.

At a court held on the 22nd day of October, 1894, this action coming on to be heard on pending motion is submitted.

At a court held on the 19th day of October, 1894, the court being advised, it is ordered that defendant's motion to compel plaintiffs to elect be, and is overruled, to which the defendants except.

17 December 10, 1894, set at rules by plaintiff-.

At a court held on the 17th day of December, 1894, on motion of plaintiffs, by counsel, ordered that this case be passed one week on the docket.

At a court held on the 24th day of December, 1894, on motion of defendants by counsel, ordered that this case be passed on the docket until January 7, 1895.

At a court held on the 7th day of January, 1895, on motion of plaintiff-, by counsel, it is ordered by the court that this case be and is postponed one week on the docket.

At a court held on the 14th day of January, 1895, came the defendant, German National Bank, by Humphrey & Davie, counsel, and filed *their* answer herein. Came the defendants, Adolph and Albert Reutlinger, by counsel, and filed their joint answer herein. And on motion of plaintiff-, by counsel, it is ordered by the court that this action be and is postponed one week on the docket.

Said answer of the German National Bank is as follows:

Jefferson Circuit Court, Law and Equity Division.

A. J. SPECKERT, &c., Plaintiffs,
vs.
GERMAN NATIONAL BANK, &c., Defendants.

Answer of German National Bank.

18 The defendant, The German National Bank, in answer to the petition herein, says that it is true that it is and was at all of the times mentioned in the petition, a banking corporation, duly incorporated and organized under an act of the Congress of the United States of America, known as the national bank act, and thereby empowered to do a general banking business; to contract and be contracted with; to sue and be sued. It does not know nor has it knowledge or information sufficient to form a belief who were, on the 25th of July, 1893, or theretofore, and now holders of the capital stock of the Louisville Deposit bank. It denies that the said Adolph Reutlinger is now president of this defendant. It denies that on the 30th of March, 1891, the said Adolph Reutlinger, Albert Reutlinger and Moses Schwartz, or any of them, acting as officers of this defendant or otherwise, unlawfully or fraudulently or at all conspired or confederated together or with this defendant, or entered into any fraudulent agreement or conspiracy at all, or with this defendant or that this defendant at any time, either unlawfully or fraudulently conspired or confederated with any person or persons or entered into any fraudulent agreement or conspiracy, or any agreement or conspiracy of any kind, or for the purpose of defrauding or wrongfully deceiving or cheating the plaintiffs herein, or any of them, or any persons who might subscribe or who did afterwards subscribe to or pay into the Louisville Deposit bank, as stockholders thereof, any sums of money or any persons who might be induced to subscribe or pay in any sums of money, to organize the Louisville Deposit bank; or that this defendant did at any time, with any person or any persons at all, enter into an agreement or conspiracy to accomplish the organization of the Louisville Deposit bank or to obtain from plaintiffs or any persons any sums of money whatsoever, and defendant denies that any sums of money were obtained from the stock of the Louisville Deposit bank in pursuance of any such agreement, or conspiracy, or that any money subscribed or paid into the said deposit bank was obtained by this defendant or any of the defendants for the use and benefit of this defendant; and it denies that it did, with the persons named in the petition or any other persons unlawfully or at all conspire for the purpose as aforesaid, or that this defendant did in any way, by itself or by any other, make any representation to the plaintiffs or any false representation to the plaintiffs, or that this defendant, either did by itself or by any other enter into any conspiracy or agreement with any person to solicit to sub-

scribe for stock, or to organize the Louisville Deposit bank, or to make any one or all of the representations set out
19 in the petition; and it denies that this defendant represented to the plaintiffs or to any of the stockholders of the Louisville Deposit bank that there was an opening in the city of Louisville for a new bank, or that the said Schwartz was a man of means or influence, or that he had an extensive acquaintance or that he was fitted or financially able to conduct successfully a bank business, or that he had been a customer of this defendant for a period of over fifteen years, or that he had conducted business with this defendant during that time, or was one of its largest customers or that he had a running balance of $75,000 a month cash deposited with this defendant, or that he had in New York to his credit a running balance of from $50,000 to $75,000 or for any sum, or that he owed but little debts, or that he had enough collateral in his possession to pay the debts, or that he was worth from two to three hundred thousand dollars above the payment of his debts; and it denies that it made any representation in reference to the above matters at all, or that it did so with any purpose to in any way defraud the plaintiffs or any other persons.

And this defendant further denies that it falsely or at all represented to the plaintiffs or to any persons, with any purpose to induce them to subscribe for stock in the Louisville Deposit bank; that it had any object in getting up said bank, or that it intended to get up any such bank, or that its object was that stated in the petition; and it denies that the persons named in the petition or any of them, under any combination, agreement, conspiracy, or authority from this defendant, made any of said representations at all; and as to whether the other defendants did make any of said representations in any way or for any purpose, it had no knowledge or information sufficient to form a belief and it denies that if any of the said other defendants did make any of said representations, the same were made with any false or fraudulent purpose or intent. It denies that it ever represented that it intended to consolidate with any other bank or under any other charter, or that it had any purpose in starting a bank to consolidate with this bank; and it denies that in pursuance of any such conspiracy, confederation or agreement, or of any confederation, conspiracy or agreement, any of the persons named in the petition subscribed to any stock in the Louisville Deposit bank; and it denies that in pursuance of any such conspiracy or fraudulently or unlawfully any of the persons named in the petition either solicited or procured the plaintiffs or any of them or any other persons to subscribe to the capital stock of the Louisville Deposit bank, or that by any fraudulent
20 conspiracy, solicitation, misrepresentation or endeavor on any part of this defendant or upon the part of any other persons acting for this defendant or in its authority, or for its benefit, the plaintiffs or any of them were induced to subscribe for any shares of stock in the Louisville Deposit bank; and this defendant says that as to whether solicitations, representations or endeavors were made by any of its codefendants, to procure subscriptions to

the Louisville Deposit bank, it does not know nor has it knowledge or information sufficient to form a belief, but it denies that if any were made they were made for or in pursuance of any fraudulent or other combination, conspiracy or agreement with this defendant or by authority in any way from it; and it does not know nor has it knowledge or information sufficient to form a belief as to who subscribed for stock in said Louisville Deposit bank, or as to the amount of such subscriptions. It denies that any representations were ever made by it of a false or fraudulent or of any character, or were falsely or fraudulently made for the sole or any purpose of defrauding the plaintiffs or those in common interest with them, or any persons, or that any such representations were made for the use and benefit of this defendant or in its interest or by its authority; and it denies that there were any false or fraudulent representations made at all; and it denies that at the time the said alleged representations were made, as set out in the petition, it knew that the said Moses Schwartz was insolvent or that he did not have any property or estate of value, or that he was in any way indebted beyond his means, or that the said Reutlingers knew his financial condition, if by this allegation is meant that they knew that he was not solvent. Further than the allegations of the petition as to his having been a director of this defendant, this defendant does not know nor has it knowledge or information sufficient to form a belief as to what corporation the said Moses Schwartz was a director in or as to who were his associates in such directory. It does not know nor has it knowledge or information sufficient to form a belief as to what were the investments of the said Adolph Reutlinger, Moses Schwartz and Albert Reutlinger in the Oregon Gold Mining Company. It denies that it or the defendants, Adolph Reutlinger or Albert Reutlinger, knew at all or any of these times, that the said Schwartz did not have such a running account as the said other defendants represented him to have. It denies that the said Moses Schwartz discounted with it, or its officers, commercial paper and other paper which was wholly worthless, or that
21 this defendant or its officers knew at the time the said Schwartz discounted the paper that it was other than good. It denies that the said Schwartz was at the time stated in the petition indebted to this defendant in a sum exceeding $223,000 in any proper sense of this term; and it denies that it held as security for the indebtedness of the said Moses Schwartz worthless paper endorsed by the insolvent persons, or which it knew to be other than good, or collateral which it knew to be other than sufficient; and it denies that it knew as to what was the running deposit of the said Moses Schwartz in a New York bank, or that the said Adolph Reutlinger and Albert Reutlinger made any representation in reference to any such running deposit which was not true or was not believed by them to be true, or that this defendant made any representation of any kind in reference thereto. It denies that the said Adolph Reutlinger or the said Moses Schwartz in pursuance of any such fraudulent conspiracy or agreement or in pursuance of any conspiracy or agreement at all, went to the city of New York with the

letter mentioned in the petition. It does not know nor has it knowledge or information sufficient to form a belief as to what were the contents of any such letter, if there was one; and it denies that the statements in said letters were untrue or were known to be untrue at the time they were made. It denies that said letter was given to the said Schwartz or the said Albert Reutlinger went with said Schwartz to New York in pursuance of said conspiracy formed as aforesaid, or that they had been formed, or for the purpose of enabling the said Schwartz to obtain any false or fictitious credit, or thus to deceive or to defraud the public, or to deceive the plaintiffs or any of them; and it denies that in pursuance or with a view to any such purpose the said Albert Reutlinger did go to New York or did go to any bank or did obtain from said bank credit, or that any credit obtained by the said Moses Schwartz in New York was obtained through the machinations of the said Adolph or Albert Reutlinger or either of them; and it denies that either defendant or the said Albert or Adolph Reutlinger knew that the paper discounted in New York was not good, or was endorsed by persons who were insolvent, or that this defendant knew that it was not good paper. It denies that any credit so obtained or carried along by the said bank in New York was obtained or carried along through any inducement or false representation upon the part of this defendant or of any persons in its interest or under its authority or through any
22 false representation upon the part of the said Adolph or Albert Reutlinger, or upon paper which this defendant or the said Reutlingers knew to be worthless, and it denies that said credit or discount was obtained for the purpose of enabling the said Schwartz to present to those whom the defendant desired to induce to subscribe for stock in the Louisville Deposit bank, or to exhibit to them, the passport of the said New York bank, showing that the said Moses Schwartz had upon deposit with the said New York bank a large sum of money, or that this was done when said credit of said money had been fraudulently obtained, or that at that time this defendant or either of the Reutlingers knew that the said Schwartz was insolvent or that the banks in New York could not have realized less than their debt upon the securities which had been pledged for the loans of the said Schwartz; and it denies that it used any means for the purpose of obtaining subscriptions to the stock of the Louisville Deposit bank, or to obtain the money of the plaintiffs or any others, or that this was done for the purpose of enabling the said Schwartz to take any money obtained from the plaintiffs or any of them to subscribe to the stock of the Louisville Deposit bank or by any means of discounting for the said Louisville Deposit bank bad paper to use in any way the moneys so obtained by said discounts or by said subscriptions of stock in liquidation of any claims which it has against the said Schwartz, as aforesaid, or upon which he was liable; or that the said Schwartz might pay the said money so subscribed to it; and it denies that any part taken by the said Schwartz in the organization of the said Louisville Deposit bank was in pursuance of any conspiracy or fraudulent agreement in which this defendant or any person in its interest or

by its authority was engaged, or in pursuance of any fraudulent conspiracy of said Albert or Adolph Reutlinger; and it denies that in pursuance of any such conspiracy or for any such purpose the said Schwartz did obtain subscriptions for the plaintiff or from any others for any sum; and it denies that any moneys were received by the said Louisvilie Deposit bank, for such subscriptions in pursuance of any such conspiracy, or of any conspiracy, or that in any way by the procurement or machinations of this defendant the said Schwartz was elected president of the Louisville Deposit bank, or the said Albert Reutlinger agreed or represented that he would become the cashier of the bank, or that in pursuance of any such conspiracy or fraudulent agreement or to more easily affect the objects or purposes thereof another person was made cashier of the said Louisville
23 Deposit bank; and it denies that in pursuance of any agreement or conspiracy with it or with any person in its interest or by its authority, the said Albert Reutlinger or his brother, R. E. Reutlinger or the said Kelly, did not pay their subscriptions to the stock which they had subscribed for the Louisville Deposit bank or that this defendant had any influence in that action the one way or the other; or that through any influence upon its part any conspiracy or agreement in which it was in any way involved or any agreement or conspiracy at all, their subscriptions were transferred to any other person. It does not know nor has it knowledge or information sufficient to form a belief as to how the said Moses Schwartz paid for his stock in the Louisville Deposit bank; but it denies that he did so in any way in pursuance of any conspiracy or fraudulent agreement with this defendant or in which it had any interest, or in which any person interested for it or *in* its authority entered or took part; and it denies that the said Schwartz did, after he became president of said Louisville Deposit bank, or at any time in pursuance of any fraudulent agreement or machinations of this defendant or of any person in its interest or under its authority, cause worthless paper to be discounted by the said Louisville Deposit bank, or that he did in that way or in any way fraudulently pay to the German National Bank, this defendant, any sums due by him to it; and it denies that he did pay to this defendant the sum of $200,000 or any sum upon any claims which were known by this defendant to be worthless, or with money which was obtained by him under any fraudulent agreement, arrangement or conspiracy known to this defendant or in which it had any part or in which any person was engaged for its interest or by its authority, and it denies that the money paid to it by the said Schwartz was paid in pursuance of any conspiracy or fraudulent agreement, or that it received said money in pursuance of any conspiracy or fraudulent agreement, or that it received any money knowing it was the money of the Louisville Deposit bank, or that it received any money in fraud of the rights of the Louisville Deposit bank, or of any of the plaintiffs or of any of those who had subscribed for stock in the Louisville Deposit bank. It denies that at the time the said defendants, Adolph Reutlinger and Albert Reutlinger and Moses Schwartz, and this defendant were getting plaintiffs and said others

having a common interest with them, to subscribe and pay into the said Louisville Deposit bank, to the stock of the Louisville
24 Deposit bank, as aforesaid, or were causing the said Moses Schwartz to obtain false and fictitious credits in New York and other places the said Moses Schwartz was indebted to this plaintiff in a sum exceeding $223,000; and it denies that there was any such agreement, conspiracy or fraudulent combination to obtain the said subscriptions or payments to the Louisville Deposit bank, or any false or fictitious credit in New York or other places, to the said Schwartz and it denies that in order to relieve this defendant of the indebtedness of said Schwartz to it, or to lift the debts owing to it by the said Schwartz and transfer such indebtedness to the said Louisville Deposit bank, or to cause the loss to fall upon the plaintiff- or those united with them in interest, or any of them, or upon the Louisville Deposit bank, or for any one, more or all of said purposes, this defendant, or any person in its interest or under its authority entered into any conspiracy whatsoever or obtained any money whatsoever of the plaintiffs or any of them or any other person for the benefit of this defendant, or for the benefit of any other persons to this defendant known; and it denies that by reason of any conspiracy or combination or agreement or machinations of this defendant the said Adolph Reutlinger, Albert Reutlinger or any of them, the Louisville Deposit bank was depleted to the extent aforesaid, of its capital or to any extent, or that worthless paper or securities were given in lieu thereof, or that it was compelled to suspend, or that by reason of this it made the assignment.

It does not know nor has it knowledge or information sufficient to form a belief as to whether plaintiffs ever made due demand upon the said Germania Safety Vault and Trust Company to bring this suit. It denies that the said Germania Safety Vault & Trust Company could have brought this suit justly or that there is any just cause of action in the plaintiffs or in the said Germania Safety Vault & Trust Company therefor.

It does not know, nor has it knowledge or information sufficient to form a belief as to the ignorance of the plaintiffs of the financial condition of said Moses Schwartz, or as to the real and true condition of the various matters set forth in their petition or of the falsity of the representations of the said Moses Schwartz and it denies that it or the said Reutlingers or any person has made any false or fraudulent representation upon its behalf, or that any person in its interest or by its authority has made any such. It denies that the said Adolph Reutlinger and Albert Reutlinger knew all about the said Schwartz's condition, or that anybody knew all about it
25 except the said Schwartz himself. It does not know nor has it knowledge or information sufficient to form a belief that the plaintiffs or any of them, or any of the said others, relied upon any representations that were made in regard to Schwartz's fortune, or that in reliance upon any such representations, any subscriptions made in reference to these matters were either false or fraudulent when made; and it denies that it or any person by its authority or in its interest ever made any representations of any kind with the

purpose or with the effect of inducing any subscriptions to the stock of the said Louisville Deposit bank. It does not know nor has it knowledge or information sufficient to form a belief that the said Adolph or Albert Reutlinger represented that the said Moses Schwartz had money in the bank of this defendant to pay for his subscription. It does not know nor has it information or knowledge sufficient to form a belief that the said Schwartz produced or exhibited in the presence of the plaintiffs or any of them his accounts with the banks in New York or as to what said account books showed, or as to what he represented he was able to subscribe and pay for in the amount of said stock. It does not — nor has it knowledge or information sufficient to form a belief as to what influence the fact that the said Reutlingers or members of their firm or other persons directors in the German national bank being willing to subscribe to the stock in the Louisville Deposit bank, had upon the other subscribers thereto or as to how far it operated as an inducement, or how far it was intended to operate as an inducement to make them subscribe; but it denies that it did operate or was intended so to operate in pursuance of any fraudulent or other conspiracy or agreement; and it denies that in pursuance of any such fraudulent agreement or conspiracy or any agreement or conspiracy these plaintiffs were induced, or any of them or others were induced to subscribe or pay for the stock of the Louisville Deposit bank. It does not know nor has it knowledge or information sufficient to form a belief as to what the said Albert Reutlinger or the said Adolph Reutlinger or the other directors of this defendant did with their stock that they subscribed for; and this defendant denies that it did in confederation or conspiracy with the said Schwartz or at all systematically or continuously unload upon the said deposit bank any worthless paper of the said Schwartz or renewals of the same paper held by this defendant at the time of the organization of the said deposit bank, or that it fraudulently obtained for
26 itself, or any of the other defendants fraudulently obtained for this defendant, any money contributed by the plaintiffs or others as aforesaid, to the said Louisville Deposit bank for the use or benefit of this defendant.

Defendant denies that there was any false or fraudulent representation or conspiracy or agreement to defraud the Louisville Deposit bank or its stockholders for the benefit of this defendant, or any conspiracy or agreement or purpose of fraud at all; or that any representations were made or any conspiracy or agreement entered into by this defendant or by any person in its interest or with its authority with the intention or with the view that such representations should be acted upon by the plaintiffs or by any of them or by any of the said others, or that they were so acted upon by the said plaintiffs or any of them — of any of the said others; and it denies that in pursuance of said conspiracy or fraudulent agreement the Said Schwartz, upon the organization of said Louisville Deposit bank, misappropriated funds or securities of said bank in payment of his indebtedness to this defendant, or that the said Schwartz in making any payments to this defendant made them in pursuance

of any fraudulent conspiracy or agreement as aforesaid, or that the said defendant or Adolph or Albert Reutlinger colluded with him in any such or in any fraudulent agreement or conspiracy; and it denies that the said Schwartz, in pursuance of any conspiracy or collusion with this defendant or with any of the other defendants, in the interest of this defendant, or by its authority, diverted any of the money of the said deposit bank from its legitimate purposes, to pay off his said indebtedness to this defendant, or by such means did pay off his said indebtedness or any of it to this defendant or that the payments were made to this defendant by misappropriating the funds or securities of the said Louisville Deposit bank either in actual money loaned by the said Schwartz to himself and the bank, or in improper securities or by transfer of the securities of the Louisville Deposit bank, to the said German national bank or by receiving worthless or greatly depreciated paper collateral from this defendant in return. It denies that the assets of the Louisville Deposit bank have been depleted in pursuance of any conspiracy, fraudulent agreement or collusion of this defendant with the said Moses Schwartz, or with the said Adolph Reutlinger or Albert Reutlinger or any of them. It does not know nor has it knowledge or information sufficient to form a belief as to how much of this debt the assets of the said Louisville Deposit bank will pay.

27 2. And this defendant, further answering herein, says that it has the powers and authorities granted to it under the national bank act and no others; that its officers have the powers and authorities granted to them under said national bank act and no others; and it says that under said national bank act its officers had no power or authority to enter into any agreement, conspiracy or confederation such as is charged in the petition, and had no authority to make any representations which would be in any way binding upon this defendant, in order to organize the Louisville Deposit bank or to induce subscriptions thereto, and this defendant says that it pleads and relies upon the limitations upon its charter powers and upon the authority of its officers as contained in said national bank act, and relies thereon as an exemption from liability for any misrepresentation, agreement or conspiracy which may have been made or entered into by any of its officers, directors, agents or servants, if any there were; at the same time denying that any of said officers, directors, agents or servants did make any misrepresentations or enter into any fraudulent or other combination or conspiracy with the intent or with the effect of wronging the plaintiffs or any of them or any of the stockholders of the said Louisville Deposit bank; and having fully answered, it prays to be hence dismissed.

HUMPHREY & DAVIE,
O'NEAL & PRYOR,
Att'ys for Ger. Nat. B'nk.

The affiant, J. M. McKnight, under oath states that the allegations contained in the foregoing answer *is* true as he verily believes and that he is president of said bank.

J. M. McKNIGHT.

Subscribed and sworn to before me by J. M. McKnight, this the 14th day of Jan'y, 1895.

JOS. PRYOR,
N. P., J. Co., Ky.

Commission expires May 9th.

28 Said answer of Adolph and Albert Reutlinger is as follows:

Jefferson Circuit Court, Law and Equity Division.

A. J. SPECKERT, &c., Plaintiffs,
vs.
GERMAN NATIONAL BANK, &c., Defendants.

Answer of Adolph and Albert Reutlinger to the Petition of Plaintiffs.

The defendants Adolph and Albert Reutlinger, in answer to so much of the petition as they are advised it is material for them to answer, say that this defendant, Adolph Reutlinger, is now the president of the German national bank, and Albert Reutlinger now holds no office in said bank. Each of these defendants denies the following allegations contained in the petition; that is, that he, with the other or with any others, unlawfully, or fraudulently or at all conspired or confederated with Moses Schwartz or with any person or entered into a fraudulent agreement or conspiracy with the said Moses Schwartz or any person for the purpose of defrauding or deceiving or cheating the plaintiffs herein or any of them, or others who might subscribe to the stock of the Louisville Deposit bank or organize the bank, or that they either combined, confederated or conspired to obtain from the plaintiffs or any of them or the other persons the money which was subscribed to the Louisville Deposit bank, or, that they entered into any agreement, conspiracy, or confederation for the use or benefit of the German national bank or either of themselves or any other person. They each deny that they did falsely represent to the plaintiffs or any of them or to the said other persons that there was an opening in the city of Louisville for a new bank or that the said Moses Schwartz was a man of large means and influence, having extensive acquaintance, fitted financially, able to conduct successfully a banking business; or that the said Moses Schwartz had conducted business with the German national bank during all of said time.

These defendants believed each and every of these statements to be true, and had every reason to believe them to be true.

29 They deny that they represented that the said Schwartz had a running balance of $75,000 a month cash deposit with the German national bank or that he had in New York a running balance of from fifty to seventy-five thousand dollars, or that he had but little debts, or that he was worth from two hundred to three hundred thousand dollars above the payment of his debts. They deny that the said Schwartz was ever a director in said bank, or

that they ever said that he had been a director therein. They deny that they or either of them ever falsely represented to the plaintiffs or to any persons at all, or to induce them or any of them to subscribe for stock in the Louisville Deposit bank, that their object in getting up said bank was finally to consolidate their bank with the Louisville Deposit bank at all or under any charter or that they had concluded to conduct no longer the banking business under the national bank system; or that it was their object to start under this new bank with a view of consolidating it with the German national bank. They deny that in pursuance of said or any conspiracy, confederation or agreement the said Moses Schwartz made his subscription to the stock of the Louisville Deposit bank, or that the said Albert Reutlinger made his subscription thereto, or that he caused his brother Rudolph Reutlinger to subscribe for any part thereof, or C. W. Kelly, one of the directors of said German national bank, to subscribe therefor; and they deny that they with the said Moses Schwartz, or with any other person, or at all, in pursuance of said or any conspiracy or confederacy, fraudulently or at all solicited or procured the plaintiffs or any of them or any other persons to subscribe to the capital stock of the Louisville Deposit bank; and they deny that by the said fraudulent or any conspiracy, solicitation, misrepresentation or endeavor on the part of these defendants, or any of them, the plaintiffs or any of them were induced to subscribe to or did subscribe for any shares of stock in the Louisville Deposit bank, either to the amount set out in the petition or to any amount.

They deny that they made false or fraudulent representations of any kind, or that they made any representations for the purpose of defrauding plaintiffs or any of them or those in common interest with them, for the use and benefit of the German national bank or for any purpose. They deny that they or either of them at that time knew that the said Moses Schwartz was insolvent, or that he did not have property in the State of value, or that he was largely indebted other than that a man having as large business con-
30 cerns as he had was usually and necessarily indebted; and they deny that they knew his financial condition, if by that is meant that they knew that his financial condition was a bad one.

They deny that the said German national bank had under discount worthless commercial paper, or that at the time the said alleged representations were made (and the defendants deny having made them) the said Moses Schwartz was indebted to the German national bank in a sum either exceeding or equal to said $223,000 in any proper sense of the term "indebted" or that he was liable to said German national bank upon paper to the said extent; and they deny that the said German national bank at that time held as security for said indebtedness paper known to be worthless to these defendants or either of them or collateral consisting of stocks which had no value or which were almost if not entirely worthless.

They deny that at the time stated in the petition or at any time

in pursuance of said or any fraudulent conspiracy or agreement, the said defendant Albert Reutlinger, went with the said Moses Schwartz to the city of New York. The defendant Adolph Reutlinger, says it is true that he did give to said Schwartz a letter of introduction when he went to New York. He does not at this time recollect the exact terms of the said letter, and he calls for the production thereof; but he denies that it was given in pursuance of any false or fraudulent conspiracy or agreement, or any conspiracy or agreement whatsoever; and he denies that there is any statement contained in said letter which he did not at the time he made it fully and in good faith believe to be true. The defendants deny that in pursuance of the conspiracy alleged in the petition, or any conspiracy, or for the purpose of enabling the said Schwartz to obtain a false or fictitious credit, or for the purpose of enabling the said Schwartz to deceive or defraud the public or the plaintiffs or any of them or those having a common interest with the plaintiffs or any of them, the said Albert Reutlinger and the said Moses Schwartz went to New York or that with any such purpose or in pursuance of any such confederacy, conspiracy or agreement or at all the said Adolph or Albert Reutlinger procured or assisted the said Moses Schwartz in procuring from the American Exchange National Bank of New York City or of any bank any credit, or that the said Moses Schwartz, by the connivance of these defendants, or either of them discounted any paper to the said New York bank, which was worthless, or which was not believed by these defendants to be good,
31 or which was endorsed by persons who were known to these defendants or either of them to be insolvent; and they deny that the credit so obtained or carried along by the said Moses Schwartz in New York was obtained or carried along through the inducement or false representations of these defendants or either of them, or that said credit or discount was obtained for the purpose of enabling the said Schwartz to present to those whom the defendants desired to induce to subscribe to the stock in the Louisville Deposit bank, or to exhibit to them the passport of said New York bank, showing what is alleged in the petition or any other thing; and they deny that any credit obtained by the said Schwartz in New York was obtained through any fraudulent arrangement upon their part or either of them, or through any false or fraudulent representation upon their part or the part of either of them. They deny that at that time the said Schwartz was insolvent or that the banks in New York could not have realized more than a very immaterial part of the money loaned him, or that if this is true they or either of them knew it then to be true; and they deny that they or either of them used said means or any means for the purpose of obtaining subscriptions to the stock of the Louisville Deposit bank, or to obtain the money of the plaintiffs or any of them, or of said others, or any of them, or that they did so for the purpose of enabling the said Schwartz to take the money which was obtained from plaintiffs or any of them or of others or any of them, subscribing for stock in the Louisville Deposit bank, or by means of discounting to said Louisville Deposit bank bad paper, or that they

or either of them did any things with the intent or purpose to use the money obtained by said discounts in liquidation of claims which the German national bank held against Schwartz as aforesaid, or upon which he was liable, or that the said Schwartz might pay the said money so subscribed in pursuance of any conspiracy or fraudulent agreement, to the said German national bank; and they deny that the said Moses Schwartz, in pursuance of any agreement or conspiracy with these defendants or the German national bank or with any of them, organized the said Louisville Deposit bank or obtained any subscriptions from the plaintiff or from those having a common interest with them, to the extent of any sum, or that the said Moses Schwartz in pursuance of any such conspiracy or fraudulent agreement upon the part of these defendants or said German national bank or any of them, received from such subscriptions any money, or that by the procurement or machinations
32 of these defendants or either of them the said Moses Schwartz was elected president of the Louisville Deposit bank, or that the said Albert Reutlinger in pursuance of any conspiracy or fraudulent agreement of any character at any time agreed or represented that he would become the cashier of the Louisville Deposit bank. They deny that in pursuance of any conspiracy or agreement or to affect the objects or purposes thereof, the person named in the petition was made cashier of the Louisville Deposit bank.

They deny that the transfer of any subscriptions of stock to the said Schwartz was made by any person believing the said Schwartz was fraudulently paid for any such subscriptions so transferred to him, with the funds of the Louisville Deposit bank, or funds which had been contributed by these plaintiffs or any of them, or those having a common interest with them or any of them; and they deny that the said Schwartz in pursuance of any conspiracy or fraudulent agreement or after the organization of the said Louisville Deposit bank, or at any time, in pursuance of any fraudulent agreement or machinations, in which these defendants or the German national bank had any part, caused worthless paper with himself and others to be discounted to or the money obtained by him from the said Louisville Deposit bank; or that the said Moses Schwartz did at any time or in any way or in pursuance of any conspiracy or agreement upon the part of these defendants or the German national bank or any of them, or to the knowledge of these defendants or either of them, fraudulently pay to the said German national bank any sums of money; and they deny that they or either of them, either privately or officially or in pursuance of any conspiracy or fraudulent agreement or otherwise, than in the usual course of business, receive any money from said Moses Schwartz or receive any money from him knowing it was the money of the Louisville Deposit bank, or that it was paying it or any part of it in fraud of the rights of the Louisville Deposit bank or in fraud of the rights of the plaintiffs or any of them, or of any persons who had subscribed to its stock. They deny that at any time they ever caused the said Moses Schwartz to obtain either false or fictitious credits in New York or other places or that at any time they or either of

them procured the plaintiffs or any of them or said others having a common interest of any of them, to subscribe any pay for the stock into the said Louisville Deposit bank, or that at that time the said Moses Schwartz was indebted to the German national bank in
33 the amount stated in the petition, or in any true sense of the term "indebted" and they deny that in order to relieve the said German national bank, of any indebtedness or to lift the debts owing to it by said defendant Moses Schwartz, or to transfer such indebtedness to the Louisville Deposit bank, or to cause the loss to fall upon the plaintiffs or any of them, or upon the said Louisville Deposit bank, they or either of them entered into any conspiracy or obtained the money of the plaintiffs and other persons or any part thereof either for the benefit of themselves or either of them or for the benefit of the said German national bank. They deny that by reason or in pursuance of any conspiracy or combination or agreement or machinations on their part or on the part of either of them or with the German national bank or with any other person or corporation, the Louisville Deposit bank was depleted of any money, or that worthless paper or securities given in lieu thereof were obtained by it, or it was ruined or became insolvent, or was compelled or did suspend.

They deny that the Germania Safety Vault & Trust Company had any right to bring this action against these defendants or any of them, or that there is any cause of action against them. They deny that they or either of them made any false or fraudulent representations, or that they or either of them knew the financial condition, if by that is meant the insolvent condition or the insolvency of the said Moses Schwartz, and they deny that the plaintiffs or any of them relied upon any representations made by these defendants or either of them, in subscribing to the stock in the Louisville Deposit bank or paying therefor.

They deny that they or either of them represented that Schwartz was actually worth from two to three hundred thousand dollars over and above his liabilities, or that the plaintiffs, or any of them, or those united in interest with them, or any of them, relied upon any representations upon the part of these defendants to that effect, or that in reliance upon any such representation the plaintiffs, or any of them, or said others or any of them, subscribed to or paid in their money for stock of the Louisville Deposit bank. They deny that they, or either of them, represented that the said Moses Schwartz had money at their bank to pay for his stock.

They deny that they represented in any way that the said Moses Schwartz had to his credit in New York any sum, or that he was able to subscribe or pay for stock. They deny that they represented that the defendant, Albert Reutlinger, and the said
34 R. E. Reutlinger, and the members of the family of said Adolph Reutlinger, and the directors of the German national bank, were willing to subscribe for any stock other than they were willing to subscribe for, and did subscribe for; and they deny that such subscriptions were intended to or did operate as an inducement, or in pursuance of any conspiracy or agreement, or that thereby the

plaintiffs, or any of them, or others or any of them, were induced to subscribe or pay for the stock of the Louisville Deposit bank as aforesaid. They deny that when they turned over their stock to the said Moses Schwartz they knew him to be insolvent; and they deny that they or either of them, in confederation or conspiracy with the said Moses Schwartz, or at all, or systematically or continuously, did unload upon the said Louisville Deposit bank the worthless paper of said Moses Schwartz or renewals of the same paper held by the German national bank, at the time of the organization of the said Louisville Deposit bank, or that they or either of them, in that way or in any way, fraudulently obtained either for themselves or for the German National any money of the Louisville Deposit bank, however procured by it.

They deny that the said false and fraudulent representations or the said conspiracy or agreement, or any representations or any conspiracy or agreement, were ever made by them or either of them, to defraud the Louisville Deposit bank or its stockholders, or any of them, for the benefit of the German national bank, or at all; that there were ever any false or fraudulent or untrue representations of any kind made by them or either of them made with the intention that they should be acted upon by the plaintiffs or any of them, or others or any of them, becoming stockholders of the Louisville Deposit bank; and they deny that they were acted upon by the plaintiffs or any of them, or any of the others; and they deny that in pursuance of any conspiracy or agreement the said Schwartz misappropriated the funds or securities of the said bank in payment of his indebtedness to the said German national bank, or that at any time these defendants or either of them, in pursuance of said fraudulent conspiracy or agreement aforesaid, or at all, colluded with him in doing the same; and they deny that the said Schwartz in conspiracy or collusion with these defendants or either of them, or with the said German national bank, fraudulently diverted the money of the said Deposit bank, from its legitimate purposes, to pay off his indebtedness to the said German national bank, or that in pursuance of any conspiracy or agreement or
35 in collusion with these defendants, or either of them, the said Schwartz diverted any money of the said Deposit bank to pay his indebtedness to the German national bank or for any purpose. They deny that any payments made by the said Schwartz to the German national bank were to the knowledge of these defendants, or either of them, misappropriations of any funds or securities of the Louisville Deposit bank, either in actual money or in any other things of value; or that in collusion with these defendants, or either of them, or the said German national bank, or in pursuance of any agreement or conspiracy there was any transfer of the securities of the Louisville Deposit bank to the German national bank, or that the said German national bank transferred to the Louisville Deposit bank worthless or depreciated paper. They deny that the assets of the Louisville Deposit bank were depleted in pursuance of any conspiracy, fraudulent agreement or collusion of these defendants, or either of them, or the German national bank,

or that by reason of this the assets of the said Deposit bank will not suffice to pay but a small portion of its claim.

They deny that they entered into any fraudulent conspiracy, agreement or combination of any kind whatsoever, with the said Schwartz for the purpose or with the effect or to the intent of procuring the plaintiffs, or any of them, or the others united with them in interest, or any of them, to subscribe for stock in the Louisville Deposit bank, or to organize said bank, or to pay in the said stock, or to misappropriate its funds, or unload upon it bad paper of the German national bank, or to obtain from it its money or securities for the benefit of the German national bank; or that they did these things either personally or officially or otherwise.

Wherefore defendants pray to be hence dismissed, for their costs and all proper relief.

The affiants, Adolph and Albert Reutlinger, under oath, states that the allegations herein contained are true.

ADOLPH REUTLINGER.
ALBERT REUTLINGER.

Subscribed and sworn to before me, by Adolph and Albert Reutlinger, this 14th day of Jan'y, 1895.

[SEAL.]

J. W. BRIGMAN,
Notary Public, Jeff. Co., Ky.

Commission expires Jan. 20, 1896.

36 At a court held on the 28th day of January, 1895:

On motion of plaintiff by counsel, it is ordered by the court that this action be, and is postponed one week on the docket.

At a court held on the 4th day of February, 1895:

On motion of defendant by counsel, it is ordered by the court that this case be and is postponed one week on the docket.

At a court held on the 11th day of February, 1895:

Came plaintiff-, by counsel, and moved the court to strike out of the answer of the German national bank filed herein the following words and sentences, contained on the 15th and 16th pages thereof: "And this defendant further answering herein, says that it has power and authorities granted to it under the national bank act, and no others; that its officers have the power and authorities granted to them under said national bank act and no others, and it says that under the said national bank act its officers had no power or authority to enter into any agreement, conspiracy or confederation such as is charged in the petition. And had no authority to make any representation which would be in any way binding upon this defendant in order to organize the Louisville Deposit bank or to induce subscriptions thereto, and this defendant says that it pleads and relies upon the limitations upon its charter powers and upon the authority of its officers as contained in said national bank act, and relies thereon, as an exemption from liability for any misrepresentations, agreement or conspiracy which may have been

made or entered into by any of its officers, directors, agents or servants, if any there were."

And plaintiffs, by counsel, file a demurrer to so much of the answer of the German national bank as is copied in the foregoing motion.

And plaintiffs also move the court to require the defendant, German National Bank, to further paragraph its answer filed herein.

And on motion of plaintiffs, by counsel, it is ordered that said motions and demurrer be and they are assigned to the 18th inst. for hearing.

And on motion of plaintiff-, by counsel, it is ordered that this action be, and is postponed one week on the docket.

37 Said motion to strike out, demurrer and motion to paragraph is as follows:

Jefferson Circuit Court, Law and Equity Division.

A. J. SPECKERT and Others, Plaintiffs,
vs.
GERMAN NATIONAL BANK and Others, Defendants. } No. 4014.

Motion to Strike Out, Demurrer, and Motion to Paragraph.

The plaintiffs move the court to strike from the answer of the German national bank, filed herein, the following words and sentences, contained on the 15th and 16th pages thereof: "And this defendant further answering says that it has the powers and authorities granted to it under the national bank act and no others; that its officers have the powers and authorities granted to them under said national bank act, and no others; and it says that under the said national bank act, its officers had no power or authority to enter into any agreement, conspiracy or confederation such as is charged in the petition and had no authority to make any representations which would be in any way binding upon this defendant in order to organize the Louisville Deposit bank or to induce subscriptions thereto; and this defendant says that it pleads and relies upon the limitations upon its charter powers and upon the authority of its officer- as contained in said national bank act, and relies thereon as an exemption from liability for any misrepresentation, agreement or conspiracy which may have been made or entered into by any of its officers, directors, agents or servants, if any there were," because the same are immaterial, irrelevant and incompetent.

2. The plaintiffs, without waiving their aforesaid motion to strike out, demur to so much of the answer of the German national bank herein as is copied in the foregoing motion, and for cause therefor, say that the same is insufficient to constitute or support any defense to the cause of action asserted in the petition.

3. The plaintiffs, without waiving their aforesaid motion to strike out, and demurrer, move the court to require the defendant, German

National Bank, to further paragraph its answer filed herein,
38 and to separate into separate and distinct paragraphs the affirmative from the negative matter therein contained.

BYRON BACON,
DODD & DODD,
ERNEST MACPHERSON,
KOHN, BAIRD & SPINDLE,
Attorneys for Plaintiffs.

At a court held on the 18th day of February, 1895:
On motion of plaintiff-, by counsel, it is ordered that this action be and is postponed one week on the docket.

At a court held on the 25th day of February, 1895:
On motion of plaintiff-, by counsel, it is ordered that *his* motion to strike out *of* the answer of the defendant-, and *his* demurrer to the answer, be and are submitted, and the court not being advised, takes time.

At a court held on the 29th day of April, 1895: The court being now advised it is considered and adjudged that the demurrer of plaintiffs to the defendants' answer, be and is overruled. And it is further adjudged by the court that the motion of plaintiffs to strike out certain parts of the defendants' answer be and is overruled.
And it is further adjudged by the court that the motion of plaintiff- to compel the defendants to paragraph their answer, be and is overruled. To all of which the plaintiffs except.

At a court held on the 6th day of May, 1895: Came plaintiffs by counsel and filed a reply to the answer of the German national bank herein. Came plaintiffs, by counsel, and filed a reply to the answer of Adolph and Albert Reutlinger, herein.
39 Said replies are as follows:

Jefferson Circuit Court, Law and Equity Division.

A. J. SPECKERT, &c., Plaintiffs,
vs.
GERMAN NATIONAL BANK, ETC., Defendants. } 4014.

Reply of Plaintiffs.

The plaintiffs, A. J. Speckert, Jacob Frankel, Harriett Frankel, Lewis R. McCleery, W. E. Glover, W. L. Long, Frank Speckert, Aaron Kohn, John Unz, Phillip Ackerman, F. J. Renz, and Andrew Krebs, for reply herein to the answer of the German National Bank, deny that said bank has no other power than the powers and authorities granted to it under the "national bank act," and deny that its officers have no other power than the powers and authorities granted to them under the "national bank act," or that its officers had no power or authority to enter into any agreement or conspiracy or confederation such as is charged in the petition; and deny that

they had no authority to make any representations which would be in any way binding upon the defendant, The German National Bank, in order to organize the Louisville Deposit bank, or in order to induce subscriptions thereto, and if by any of the affirmative allegations of the answer of the German National Bank herein it is meant by the said bank to say that the said German National Bank, if having no charter authority to do the acts complained of by the plaintiffs, could not be bound by estoppel, the plaintiffs say there is no such law, and the defendant, The German National Bank, its officers and agents are estopped to deny the binding obligations and the liability of said bank for such conduct.

The plaintiffs further replying herein, deny that the chartered powers of the defendant, The German National Bank, and its officers, or any of them as contained in the "national bank act," exempt the said defendant, The German National Bank, or any of its officers from any liability, for any or all of their misrepresentations or agreements or conspiracies which may have been and were made and entered into by the said German National Bank, or any of its officers, directors or agents, or servants, and the plaintiffs deny that there were no misrepresentations, agreements or conspiracies made or entered into by the defendant, by its officers, directors, agents or servants.

Wherefore plaintiffs pray as in their petition.

DODD & DODD,
KOHN, BAIRD & SPINDLE,
BACON & MACPHERSON,
For Plaintiffs.

COMMONWEALTH OF KENTUCKY, *County of Jefferson,* } ss:

The plaintiff, A. Speckert, says he believes the statements contained in the foregoing reply to be true.

A. SPECKERT.

Subscribed and sworn to before me in said county this 6th day of May, 1895, by A. J. Speckert.

My commission expires January 12, 1898.

JOS. H. NIEHOFF,
Notary Public for Jeff. Co.

Jefferson Circuit Court, Law and Equity Division.

A. J. SPECKERT, ETC., Plaintiffs,
vs.
GERMAN NATIONAL BANK, ETC., Defendants. } No. 4014. Reply.

The plaintiffs herein for reply to the answer of Adolph and Albert Reutlinger to the petition, deny that the defendants Adolph and Albert Reutlinger, believed each and every of the statements they confess in their answer to have made in regard to Moses Schwartz to be true, and deny that they had every or any reasons to believe

them to be true. And plaintiffs deny that at the time and times the said defendants Albert Reutlinger and Adolph Reutlinger, made the false and fraudulent representations as alleged in the petition in regard to the then indebtedness of Moses Schwartz to the German national bank, that the said Moses Schwartz was not in any proper sense or the term indebted to the said bank in the sum of two hundred and twenty-three thousand dollars, and plaintiffs deny that at the time the defendant Adolph Reutlinger gave to Moses Schwartz the letter of introduction mentioned in the petition herein

41 when the said Schwartz went to New York he believed that any statement contained in the said letter was true, or he made the statements in the said letter contained fully and in good faith or at all believing them to be true.

Wherefore plaintiffs pray as in their petition.

COMMONWEALTH OF KENTUCKY, }
County of Jefferson. }

Affiant, A. J. Speckert, says that he believed the statements contained in the foregoing reply to be true.

A. J. SPECKERT.

Subscribed and sworn to before me in said county this 6th day of May, 1895, by A. J. Speckert.

My commission as notary public expires Jan'y 12, 1898.

JOS. H. NIEHOFF,
N. P. Jeff. Co., Ky.

At a court held on the 5th day of December, 1896.

It is hereby agreed between the plaintiffs and defendants through their respective counsel, that the depositions and exhibits taken and on file in action No. 2072, in the common pleas division of this court, entitled Augustus Sharpe, plaintiff, *vs.* German National Bank, &c., defendants, may be read on the trial of the above-styled action in this court, by either party and that either party may produce and read on the trial of this action such of said depositions and exhibits taken and on file in the aforesaid action of Augustus Sharpe *vs.* German National Bank, &c., as he or it, desires, subject to all exceptions for relevancy. And it is further agreed and stipulated that either party may further examine or retake in this action or further cross-examine in this action any witness whose deposition on file in the aforesaid action of Augustus Sharpe *vs.* German National Bank, &c., is to be read.

And it is further agreed that the reading of said depositions or any of them, is to be wholly without prejudice to the rights of any of the parties herein to testify in his or its own behalf and to take further evidence.

At a court held on the 19th day of December, 1896.

Came the Germania Safety Vault & Trust Company, assignee of the Louisville Deposit bank, and the Louisville Deposit Bank, D. W. Sanders, receiver of the R. B. Cotter Lumber Company and Senn

& Ackerman Brewing Company, Charles Buddhu and Mrs. H. Frankel, by counsel and gave notice as required by rule of court.

42 And thereupon the said defendants by counsel, offered and moved the court to file their answer, counter-claim and cross-petition herein. To which the defendant, German National Bank by counsel objects.

And by consent of parties by counsel it is ordered that said motion be and is postponed until the 21st inst.

At a court held on the 21st day of December, 1896:

The court being now advised, it is considered and adjudged that the motion of the Germania Safety Vault & Trust Company, of the Louisville Deposit Bank and others to file their answer, counter-claim and cross-petition herein, be and is sustained. And it is ordered by the court that said answer, counter-claim and cross-petition be and *is* now filed.

Said answer, counter-claim and cross-petition *is* as follows:

Jefferson Circuit Court, Law and Equity Division.

A. J. SPECKERT ET AL., Plaintiffs,
vs.
GERMAN NATIONAL BANK ET AL., Defendants.

Answer, counter-claim, and cross-petition of the Germania Safety Vault & Trust Company, assignee of the Louisville Deposit bank, and the Louisville Deposit Bank, D. W. Sanders, receiver of the R. B. Cotter Lumber Company and Senn & Ackerman Brewing Company, Charles Buddhu and Mrs. H. Frankel, the latter two being depositors and creditors of the Louisville Deposit bank.

The defendants, Germania Safety Vault and Trust Company as assignee of the Louisville Deposit bank, and the Louisville Deposit Bank, joined by D. W. Sanders, receiver of the R. B. Cotter Lumber Company and Senn and Ackerman Brewing Company, Charles Buddhu and Mrs. H. Frankel, depositors of the said bank at the dates hereinafter set forth, for and in behalf of themselves and all the creditors of the said Louisville Deposit bank, for an-

43 swer herein say that they are advised and state that the allegations of the plaintiffs' petition herein are, in substance and effect, true and they unite in the prayer thereof. They, however, say that the plaintiffs as stockholders in the Louisville Deposit bank, if entitled to recover herein, such recovery must be primarily for the use and benefit of the creditors of the said Louisvelle Deposit bank, before the stockholders are entitled to share or receive any of the benefits thereof.

And for further answer and by way of counter-claim against the plaintiffs and cross-petition against the German national bank these defendants state that at the times named in the petition, and especially on and prior to the 20th day of May, 1893, and the 29th

day of May, 1893, and on the 22nd day of June, 1893, the defendant The German National Bank, through its officers, agents and directors, entered into a fraudulent combination and conspiracy with Moses Schwartz, then and theretofore a large creditor of the said German national bank, who was then hopelessly insolvent and known to be such by the German national bank with the intent and purpose of defrauding said Louisville Deposit bank and its creditors of all of its assets and effects, to the prejudice of these cross-plaintiffs and to the great profit of said German national bank. They say that the said Moses Schwartz was then the president of the said Louisville Deposit bank, and had been elected and continued as such president by reason of the influence and representations of the said German national bank, its officers and agents, in manner and form as set forth in the petition herein; that the said Moses Schwartz was represented to said Louisville Deposit bank by the said German national bank, its officers and agents, to be a wealthy man and worth over and above his liabilities at least from three hundred and fifty to four hundred thousand dollars, net. They say that by reason of the said representations and replying thereon, the said Louisville Deposit bank and its stockholders elected the said Schwartz president thereof and continued him as such president until the assignment made by the said Louisville Deposit bank to the said Germania Safety Vault and Trust Company for the benefit of its creditors, which was made on the — day of July, 1893.

They admit and make part hereof, the allegations of the petition herein and in addition thereto say that on the 20th day of May, 1893, the said Louisville Deposit bank, having a large amount of available bills receivable but being without the necessary amount of available cash on hand, applied to the said German na-
44 tional bank for a loan of one hundred thousand dollars, to be secured by collateral selected by it from its said bills receivable as aforesaid; that at the time of the said application the said German national bank, through its president and cashier, represented that it was carrying the said Moses Schwartz and could not afford, under the national currency laws, to carry the said Moses Schwartz, then the president of the Louisville Deposit bank, and the said Louisville Deposit bank, too, stating that the said Moses Schwartz was perfectly solvent and abundantly able to meet all of his liabilities and lea[illegible] him a surplus of from three to four hundred thousand dolla[illegible] assets. The said bank and its officers represented to the said L[illegible]isville Deposit bank at that time that it would loan the said Louisville Deposit bank one hundred thousand dollars on collateral to be selected by it as aforesaid from the bills receivable, of the said Louisville Deposit bank, provided the said Louisville Deposit bank would allow the said Moses Schwartz credit for the said sum of thirty-five thousand dollars; that the said Louisville Deposit bank refused to allow such credit until the said German national bank and its president and cashier represented to it, and on which representation it relied and believed to be true, that the said Moses Schwartz was worth in excess of his liabilities the amount aforesaid, and upon such representations and assur-

ances it did borrow of the said German national bank the said sum of one hundred thousand dollars and executed its obligations to it therefor, bearing six per cent. interest from date and secured by the choicest bills receivable held by it against its customers. They state that shortly after the said one hundred thousand dollars was borrowed and placed to the credit of the said Louisville Deposit bank as aforesaid, the said Moses Schwartz on the 20th day of May, 1893, and in payment of sundry pieces of paper not then due but owned and held by the said German national bank, on which he was liable, gave his individual check on the Louisville Deposit bank, for thirty-five thousand dollars, which was presented to and paid by the Louisville Deposit bank; that upon the giving of the said check as aforesaid, said German national bank surrendered to the said Schwartz thirty-five thousand dollars' worth face value, of the said Schwartz paper then held by it as aforesaid, which paper was received by the said Schwartz and never reached the Louisville Deposit bank.

They further state that under like representations and assurances and a similar state of facts, on the 29th day of May,
45 1893, another and additional loan of one hundred thousand dollars was made to the Louisville Deposit bank by said German national bank, and thereupon the said Schwartz gave his individual check to the said German national bank on the Louisville Deposit bank for $25,212.65 in anticipation and payment of that amount of paper on which he was liable, then owned and held by the said German national bank and no part of which had matured, and the said paper was surrendered to and received by the said Schwartz and no part thereof ever reached the said Louisville Deposit bank.

They further state that under like representations and assurances and a similar state of facts, on the 22nd day of June, 1893, another and additional loan of fifty thousand dollars was made by the said German national bank to said Louisville Deposit bank, and thereupon the said Moses Schwartz gave his individual check to the said German national bank, on the Louisville Deposit bank, for fifteen thousand dollars, in anticipation and payment of that amount of paper, on which he was liable, then owned and held by the said German national bank and no part of which had matured, all of which three checks were paid by the Louisville Deposit bank. They state that the aforesaid representations and assurances made by the German national bank and its officers were, and each of them was, false and fraudulent and *un*known to be false, at the time they were so made by the said German national bank and its officers as aforesaid. They state that the said German national bank, its president and cashier, at the time of the three loans aforesaid, picked out and selected from the bills receivable of the said Louisville Deposit bank, to be held by it as collateral security on the loans aggregating two hundred and fifty thousand dollars as aforesaid, more than two hundred and fifty thousand dollars in value of its assets, by virtue whereof and of said cash it practically looted the said bank and exhausted it of all of its available assets. They state that the

aforesaid three loans were evidenced to the said German national bank, by the notes of the said Louisville Deposit bank, aggregating two hundred and fifty thousand dollars face value, bearing interest from date of the making of the said loans at the rate of six per cent. per annum and secured by the collaterals aforesaid, as well as by the endorsement of the individuals constituting the board of directors of the said Louisville Deposit bank.

They state that the aforesaid individual checks of the said Moses Schwartz aggregating $75,212.65 were paid by the said
46 Louisville Deposit bank to said German national bank out of the fund of its depositors held by it in trust, by reason of the false and fraudulent representations and assurances of the said German national bank that the said Moses Schwartz was abundantly solvent and able to pay the same and because of the further representation then and there made by the German national bank, to the said Louisville Deposit bank that the paper which they desired the said Schwartz to take up and remove from the said German national bank was gilt-edge commercial paper on solvent persons when in fact and truth the said paper was worthless and known to be worthless and against hopelessly insolvent persons when the said representations and assurances were made by the said German national bank as aforesaid.

They further state that the aforesaid exactions that the Louisville Deposit bank pay the said checks of the said Moses Schwartz aggregating $75,212.65 as aforesaid, *were* fraudulent, usurious and unconscionable and unlawful and wholly in excess of the legal rate of interest allowed by law for the said loans made as aforesaid and was devised, contrived and intended to be, and was, in fact, a fraud upon the creditors of the said Louisville Deposit bank to the full amount thereof, and that there was no lawful or valid consideration to support the said exactions of the German national bank on the said Louisville Deposit bank. They state that the said worthless paper taken up by the said Schwartz had been in the main, if not altogether, owned and held by the said German national bank for many years before the said Louisville Deposit bank was organized, and had been continued by a system of renewals without the payment of any part of the principal thereof, and the same was in fact known to be by the said German national bank and its officers worthless paper, at the time the checks were given therefor as aforesaid.

They further state that the officers and directors of the said Louisville Deposit bank, other than the said Moses Schwartz, relied on the said representations made by the German national bank and its president and cashier as aforesaid, and believed the same to be true, and relying thereon and believing the same to be true as aforesaid, acquiesced in the said exactions and paid the checks of the said Moses Schwartz out of the funds held by it in trust as aforesaid. They state that by reason of the premises the said Louisville Deposit bank and its creditors and stockholders have been deceived and defrauded by the said German national bank and been dam-

aged in at least the said sum of $75,212.65 with interest
47 thereon from June 22, 1893, in addition to the damages claimed by the plaintiffs in their petition herein. They say that the said Moses Schwartz was hopelessly insolvent at the time of the transactions aforesaid and known to be so by the said German national bank, and its officers and agents, and that he continued to be so insolvent and made a general assignment for the benefit of his creditors on the 25th day of July, 1893, and thereafter absconded from the State of Kentucky, and has ever since the dates of the transactons aforesaid been, and is now, hopelessly insolvent, and the aforesaid $75,212.65 has been a total loss to the said Louisville Deposit bank, its creditors and stockholders. They say that the said Louisville Deposit bank made a general assignment on the 25th day of July, 1893, to the Germania Safety Vault & Trust Company for the benefit of its creditors, and that by reason of the facts set forth in the petition herein and the facts herein stated, its assets had been almost, if not entirely, exhausted by the said German national bank in settlement of the indebtedness of the said Moses Schwartz to the said German national bank, amounting to over two hundred thousand dollars, all of which was paid out of the assets of the said Louisville Deposit bank by reason of the fraudulent conspiracy and deceits perpetrated as aforesaid. They state that by reason of the premises and the frauds, usurious and unconscionable exactions and conspiracy between the said German national bank and the said Schwartz, as set forth in the petition and in this pleading, the said German national bank was enabled to and did succeed in relieving and ridding itself of about two hundred thousand dollars of the worthless claims it held against the said Moses Schwartz, and it has received and enjoyed the proceeds thereof contrary to equity and good conscience, and in fraud of these defendants and those represented by them. They say that the said fraudulent conspiracy and combination was entered into for the purpose of unloading upon the said Louisville Deposit bank, the said worthless paper of the said Moses Sschwartz held by the said German national bank, and was successful to the extent and manner as set forth in the petition and in this pleading.

They state that the Germania Safety Vault & Trust Company is the assignee for the benefit of creditors of the said Louisville Deposit bank, and that the defendant, D. W. Sanders, receiver of the R. B. Cotter Lumber Company, appointed such receiver by this court, deposit the funds coming to his hands as such receiver with
48 the said Louisville Deposit bank, and at the date of the assignment of the said Louisville Deposit bank had to his credit as such receiver in the said Louisville Deposit bank the sum of $34,436.28, all of which is just, due and owing and no part of which has ever been paid, and defendants, Senn & Ackerman Brewing Company, a corporation, had to its credit as depositor in the said Louisville Deposit bank, at the time of the assignment aforesaid, the sum of $3,932.13, all of which is just, due and owing and no part of which has ever been paid; and defendant, Charles Buddhu, had to his credit as depositor in the said Louisville Deposit bank, at

the time of the assignment aforesaid, the sum of $300.00, all of which is just, due and owing and no part of which ever has been paid; and defendant, Mrs. H. Frankel, had to her credit as depositor in the said Louisville Deposit bank, at the time of the assignment aforesaid, the sum of $2,000.00, all of which is just, due and owing and no part of which ever has been paid. The aforesaid deposits were made before May 20, 1893, and continued up to the date of the assignment without any knowledge or information on the part of the depositors of the said bank of the frauds committed by the said German national bank as aforesaid.

Wherefore the premises considered these defendants make this answer a counter-claim against the plaintiffs and a cross-petition against the German national bank, and pray judgment against the said German national bank primarily for the use and benefit of the creditors of the said Louisville Deposit bank for the sum claimed in the petition herein, to wit, the sum of two hundred and sixty-five thousand dollars, and also for the further sum of seventy-five thousand two hundred and twelve dollars and sixty-five cents, with interest on said latter sum from June 22, 1893, until paid, for their costs herein and for all proper relief.

BYRON BACON,
DODD & DODD,
DAVID W. BAIRD,
Attorneys for Cross-plaintiffs.

D. W. Sanders, as receiver of the R. B. Cotter Lumber Company, and Aaron Kohn, as vice-president of the Louisville Deposit bank, say the statements contained in the foregoing pleading are true, as they verily believe.

D. W. SANDERS.
AARON KOHN.

Sworn and subscribed to before me by D. W. Sanders and Aaron Kohn, this 18th day of December, 1896.
My commission expires Jan. 28th, 1900.

W. A. SPINDLE,
Notary Public, Jeff. Co., Ky.

49 At a court held on the 16th day of January, 1897: This action having been set at rules by the plaintiff- on the 11th inst. On motion of plaintiff-, by counsel, it is ordered that this action be, and is postponed one week on the docket.

At a court held on the 23rd day of February, 1897: On motion of plaintiffs by counsel, it is ordered that this action be and is postponed two weeks on the docket.

At a court held on the 6th day of February, 1897: On motion of defendant, by counsel, it is ordered that this action be and is postponed one week on the docket.

At a court held on the 13th day of February, 1897: On motion of defendant, by counsel, it is ordered that this action be and is remanded to the rules.

At a court held on the 19th day of June, 1897: This action having been set at rules by plaintiffs on the 14th inst. On motion of plaintiffs, by counsel, it is ordered that this action be and is postponed until the 28th inst.

At a court held on the 28th day of June, 1897: This day came R. H. Courtney, receiver, and filed herein his petition to be made a party defendant herein. And the plaintiffs and cross-plaintiffs object thereto, and the court being advised it is now considered that said petition be sustained. And said R. H. Courtney, receiver of the German national bank, is now made a party defendant herein to the original and to the cross petition, to which the plaintiffs and cross-plaintiffs except.

This day came R. H. Courtney, receiver of the German national bank, and presented herein his petition for the removal of this cause to the circuit court of the United States for this circuit and district, and also his bond conditioned according to law. And it is now ordered that said petition and bond be filed, said bond accepted and that the court will proceed no further herein. To all of which the plaintiffs and cross-plaintiffs at the time objected and said objections were overruled. To which they then and there excepted.

50 Said petition to be made party is as follows:

Jefferson Circuit Court, Law and Equity Division.

A. J. SPECKERT, &c., Plaintiffs,
vs.
GERMAN NATIONAL BANK, &c., Defendants.

R. H. Courtney, receiver of the German national bank, would respectfully represent unto the court that since the filing of this suit and since the filing of the last pleading herein, the German national bank has become insolvent, and that under due and regular proceedings had in conformity with the laws of the United States, and especially in conformity with that statute commonly known as the national bank act, the Comptroller of the Currency has assumed charge of all the assets of the said German national bank, and has appointed your petitioner, the said R. H. Courtney, as receiver of the said German national bank, and of all its assets, and that he is now such receiver thereof, duly appointed and qualified, and that your petitioner, the said R. H. Courtney, receiver, desires to contest the claim of the plaintiff- herein, and does now assert that the said claim is not a just one against the said German National Bank, and that no judgment should be rendered against it thereon.

Wherefore, the said petitioner, R. H. Courtney, now asks the court to require the plaintiffs to make him a party defendant herein, and upon being made such party defendant, asks to be allowed to conduct the defense herein, the said German national bank, no- being

in his hands as aforesaid, and its directors having now power or authority over its assets and being therefore without means to conduct the defense herein; and your petitioner will ever pray.

R. H. COURTNEY,
Receiver German National Bank.

Subscribed and sworn to before me by R. H. Courtney, this June 28th, 1897.

THOS. SPEED,
Clerk U. S. Dist. Court, Ky. Dist.,
By HENRY F. CASSIN,
Deputy Clerk.

51 Said petition for removal is as follows:

Jefferson Circuit Court, Law and Equity Division.

A. J. SPECKERT, &c., Plaintiffs,
vs.
GERMAN NATIONAL BANK, &c., Defendants.

Your petitioner, R. H. Courtney, receiver of the German national bank, would respectfully represent unto the court that he has been appointed by the Comptroller of the Currency and now is receiver of the defendant, The German National Bank, and the said appointment was made by the said Comptroller under the laws of the United States, and especially under that law commonly called the national bank act; that the suit herein is one arising under the constitution and laws of the United States; that it involves largely more than $5,000. Your petition- now presents herein this petition, and also a bond duly executed according to law, and asks that this petition be filed; said bond accepted and that this court will proceed no further herein; and your petitioner will ever pray.

R. H. COURTNEY,
Receiver German National Bank.

Subscribed and sworn to before me by R. H. Courtney, this June 28th, 1897.

THOS. SPEED,
Clerk U. S. Dist. Court, Ky. Dist.,
By HENRY F. CASSIN,
Deputy Cl'k.

Said bond is as follows:

Jefferson Circuit Court, Law and Equity Division.

A. J. SPECKERT, &c., Plaintiff-,
vs.
GERMAN NATIONAL BANK, &c., Defendants.

Bond.

52 Know all men by these presents, that we, R. H. Courtney, receiver, as principal, and J. T. O'Neal, and Aleck Humphrey, as sureties, are held and firmly bound unto A. J. Speckert,

and the other plaintiffs, in the cause of A. J. Speckert, &c., *vs.* German National Bank, No. 4014, of the Jefferson circuit court, law and equity division, in the full penalty of $500, — payment whereof well and truly to be made, we do hereby bind ourselves, executors and administrators, firmly by these presents, as witness our hands June 28th, 1897.

The condition of the above obligation is such that whereas, the said R. H. Courtney, receiver, has this day filed his petition in the cause of A. J. Speckert, &c., *vs.* German National Bank, No. 4014, Jefferson circuit court, law and equity division, for the removal of said cause to the circuit court of the United States for the sixth circuit and district of Kentucky—

Now, if the said R. H. Courtney, receiver, shall well and truly cause a copy of the record herein to be filed in the said United States circuit court on or before the first day of its next term and shall well and truly pay all costs that may be adjudged against him in case the said suit is wrongfully removed, then this obligation to be null and void; otherwise in full force and virtue.

R. H. COURTNEY,
Receiver German National Bank.
ALEX. P. HUMPHREY.
J. T. O'NEAL.

UNITED STATES OF AMERICA, }
State of Kentucky, Jefferson County, } *ss:*

I, John S. Cain, clerk of Jefferson circuit court, in and for the State and county aforesaid, do hereby certify that the foregoing is a full, true and complete transcript of the record and proceedings had in the case, wherein A. J. Speckert, &c., are plaintiffs, and German National Bank, &c., are defendants, No. 4014 in the above-style case, as appears of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the court aforesaid, at the city of Louisville, this 23rd day of September, 1897.

JOHN S. CAIN, *Clerk.*

STATE OF KENTUCKY, }
Jefferson County, } *ss:*

I, Emmet Field, judge of the Jefferson circuit court, in the State and county aforesaid, do certify that John S. Cain, who has signed the foregoing certificate, is and was at the time of same, clerk of said court, duly elected and qualified; that all his official acts as such are entitled to full faith and credit, and that his foregoing attestation is in due form of law.

53 Given under my hand at the city of Louisville, this 23rd day of September, 1897.

EMMET FIELD, *Judge.*

STATE OF KENTUCKY, }
Jefferson County, } ss:

I, John S. Cain, clerk of the Jefferson circuit court, in the State and county aforesaid, do certify that Emmet Field, who signed the foregoing certificate, is and was at the time of signing same, judge of said court, duly elected and qualified; that all of his official acts as such are entitled to full faith and credit, and that his foregoing attestation is in due form of law.

Given under my hand at the city of Louisville, this 23rd day of September, 1897.

[SEAL.] JOHN S. CAIN, *Clerk.*

And on November 10th, 1897, came the parties by their attorneys and by consent, it is ordered that the motion to remand herein, be set for hearing December 3rd, 1897.

And on February 8th, 1898, came the parties by their attorneys. The court being now fully advised of the plaintiffs' and cross-plaintiffs' motion to remand this case to the State court, filed a written opinion and in accordance therewith, it is ordered by the court that said motion be and the same is hereby overruled.

The opinion above referred to is as follows:

United States Circuit Court, District of Kentucky.

A. J. SPECKERT and Others
vs.
THE GERMAN NATIONAL BANK and Others.

Opinion on Motion to Remand.

In this case A. J. Speckert, Jacob Frankel, and others as stockholders of the Louisville Deposit bank sued the German
54 National Bank, Adolph Reutlinger and Albert Reutlinger, who were president and cashier of the German national bank, and Moses Schwartz, charging a combination and conspiracy to organize the Louisville Deposit bank, and after its organization to defraud it by getting a large sum of money from said Deposit bank, in payment of Moses Schwartz's indebtedness to the German national bank, Moses Schwartz being the president of the Louisville Deposit bank, and said German national bank unloading worthless assets of the German national bank, upon said Louisville Deposit bank. This suit was brought in April, 1894, and the Germania Safety Vault and Trust Company as assignee of the Louisville Deposit bank, and the Louisville Deposit Bank were made parties defendant with the alleged conspirators, the allegation being that the trust Co., as assignee of the Louisville Deposit bank, had refused upon demand to bring the suit to make the German national bank and the Reutlingers and Schwartz responsible for the money out of which the Deposit bank was alleged to have been defrauded. Process was issued on this suit and separate answers were filed by

the Reutlingers and the German National Bank. Subsequently in December, 1896, the Germania Safety Vault and Trust Co., assignee of the Louisville Deposit bank, and the Louisville Deposit Bank, and several creditors of said bank uniting therein, filed what is called a counter-claim and cross-petition against the German National Bank in which they admit the allegations of the original bill, and seek to recover from the German national bank, the several sums of money which are alleged in the original bill to have been obtained by the German national bank by conspiracy and fraud. The prayer of this cross-petition is for judgment against the German national bank primarily for the use and benefit of the creditors of the Louisville Deposit bank for the sums claims therein, to wit. the sum of $265,000.00 and the further sum of $75.212.65 with interest and for all proper relief. There was no process issued upon this cross-petition, and hence the German national bank was not before the court on the cross-petition until the day of the removal. In January, 1897, R. H. Courtney was appointed by the Comptroller of the Currency receiver of the German national bank, and he as such receiver immediately took possession of all of the property and assets of said bank. On the 28th of June, 1897, the following order was made: "This day came R. H. Courtney, receiver, and filed herein his petition to be made a party defendant herein. And the plaintiffs and cross-plaintiffs object thereto, and the court being advised, it
55 is now considered that said petition be sustained. And said R. H. Courtney, receiver of the German national bank, is now made a party defendant herein to the original and to the cross petition to which the plaintiffs and cross-plaintiffs except. This day came R. H. Courtney, receiver of the German national bank, and presented his petition herein for the removal of this cause to the circuit court of the United States for this circuit and district and also his bond conditioned according to law. And it is now ordered that said petition and bond be filed, and said bond accepted and that the court will proceed no further herein." This order was made upon the following petition: "R. H. Courtney, receiver of the German national bank would respectfully represent unto the court that since the filing of this suit and since the filing of the last pleading herein, the German national bank has become insolvent, and that under due and regular proceedings had in conformity with the laws of the United States, and especially in conformity with that statute commonly known as the national bank act, the Comptroller of the Currency has assumed charge of all the assets of the said German national bank and has appointed your petitioner the said R. H. Courtney, as receiver of the said German national bank, and of all its assets and that he is now such receiver thereof, duly appointed and qualified, and that your petitioner, the said R. H. Courtney, receiver, desires to contest the claim of the plaintiff herein and does now assert that the said claim is not a just one against the said German national bank, and that no judgment should be rendered against it thereon. Wherefore the said petitioner, R. H. Courtney, now asks the court to require the plaintiff

to make him a party defendant herein, and upon being made such party defendant, asks to be allowed to conduct the defense herein, the said German national bank now being in his hands as aforesaid, and its directors having no power or authority over its assets and being therefore without means to conduct the defense herein; and your petitioner will ever pray."

And the petition for removal is as follows:

"Your petitioner, R. H. Courtney, receiver of the German national bank, would respectfully represent unto the court that he has been appointed by the Comptroller of the Currency and now is receiver of the defendant, The German National Bank, and the said appointment was made by the said comptroller under the laws of the United States, and especially under that law commonly called the national bank act; that the suit herein is one arising
56 under the Constitution and laws of the United States; that it involves largely more than $5,000. Your petitioner now presents herein this petition and also a bond duly executed according to law and asks that this petition be filed; said bond accepted and that the court will proceed no further herein, and your petitioner will ever pray."

The transcript having been filed in this court the plaintiffs by their counsel have moved to remand the case to the court from which it came, upon, as we understand, three grounds: First, that the petition and motion for removal to this court came too late; second, that if it be a fact that it is a case arising under the laws of the United States, that fact is now shown in the plaintiffs' pleading which is necessary under the rule as announced in the case of Tennessee *v.* Union and Planters' Bank, 152 U. S., 454, and other subsequent cases, and third, that the defendant is not entitled to removal under the laws and statutes of the United States.

These questions will be considered in their order.

If Courtney, as receiver, is entitled to a removal, the fact that the petition for removal was not filed on or before the time at which by the practice and law of the State of Kentucky, the German National Bank was bound to answer, should not prevent a removal now. It is said by the Supreme Court, Justice Gray delivering the opinion, in the recent case of Powers *v.* C. & O. R'y Co.: "The existence of diverse citizenship or other equivalent condition of jurisdiction, is fundamental; the want of it will be taken notice of by the court of its own motion and cannot be waived by either party. Manchester, etc., Railway Co. *v.* Swan, 111 U. S., 379. But the time of filing a petition for removal is not essential to the jurisdiction; the provision on that subject is in the words of Mr. Justice Bradley, 'but model and formal' and a failure to comply with it may be the subject of waiver or estoppel." In this case until the receiver was appointed there was no right of removal at all in the German national bank, and the receiver made the motion immediately upon his being allowed to become a party defendant. It would be a very narrow and technical construction of the act of August, 1888, to construe it that if a person subsequently to the making up the issues in a case became entitled to removal, he could not remove because

the removal was not made before the answer or plea. The reasoning of the court in the case of Powers *v.* The C. & O. Road, *supra*, is, we think, decisive of this question. There a party, the C. & O., with one or two of its employés, were sued for personal
57 injury; the case was removed upon the petition of the C. & O. to the circuit court of the United States, and upon motion of the plaintiff, the court holding that the parties might be jointly sued, the case was remanded to the State court, and when the remanded case came for trial in the State circuit court, the parties who prevented the removal were dismissed by the plaintiff, and thereupon the railroad company filed another petition for removal, and tendered the proper bond. The State court, however, refused to recognize the validity of this removal and tried the case. The transcript was afterwards filed in the circuit court of the United States, and that court held that it was in time, and that the action of the State court after the filing of the petition and the tender of the bond was null and void. The case was appealed to the Supreme Court and that court affirmed the judgment of the circuit court. Among other things, it is said, after quoting the provisions of the statute of March, 1887, as corrected by the act of August, 1888: "This provision clearly manifests the intention of Congress that the petition for removal should be filed at the earliest possible opportunity. But so long as there does not appear of record to be any removable controversy, no party can be entitled to remove it, and the provision of the act of Congress, that 'any party entitled to remove any suit' 'may make and file a petition for removal' at or before the time when he is required to make answer to the suit, cannot be literally applied. To construe that provision as restricting, to the time prescribed for answering the declaration, the removal of a case which is not a removable one at that time, would not only be inconsistent with the words of the statute; but it would utterly defeat all right of removal in many cases; as, for instance, whenever citizens of the same State as the plaintiff were joined as defendants through an honest mistake, not discovered by the plaintiff until after the time prescribed for answering; or whenever a personal injury was supposed, at the time of bringing an action therefor, to be a comparatively trifling one, which might be fully compensated by a sum much less than $2,000 and was afterwards discovered to be so much graver, that there could be no doubt of the power and duty of the court to allow an amendment increasing the *ad damnum*. The reasonable construction of the act of Congress, and the only one which will prevent the right of removal, to which the statute declares the party to be entitled, from being defeated by circumstances wholly beyond his control, is to hold that the incidental provision as to the time must, when neces-
58 sary to carry out the purpose of the statute, yield to the principal enactment as to the right; and to consider the statu e as in intention and effect permitting and requiring the defendant to file a petition for removal as soon as the action assumes the shape of a removable case in the court in which it was brought." It is true that neither the plaintiffs nor the cross-plaintiffs originally

sued Courtney the receiver or sought judgment against him, but both having sued the German National Bank, alleging that the bank was created and organized under the laws of the United States, and whilst it is true that at the time of the filing of the original petition and of the cross-petition, this banking association which was created and organized under the laws of the United States could not remove this case, still the fact of its creation and organization is alleged in the petition, thus by the pleading of the plaintiff and of the cross-plaintiff it was alleged to be a Federal corporation, and as such was subject to be taken possession of by the Comptroller of the Currency of the United States and its assets collected and distributed under the laws and authority of the United States; hence, when the receiver became a party defendant to the original and cross petitions the case came within the exception to the rule as announced in the case of Texas & Pacific R'y *v.* Cody, 166 U. S., 606. In that case the Texas and Pacific was sued for personal injury to the plaintiff and he alleged that the Texas and Pacific was a private corporation created and existing under the laws of the State of Texas and that the defendant owned and operated a line of railway extending through certain counties. The defendant filed its petition for removal and alleged in the petition for removal that the petitioner at the commencement of the suit was and still is a corporation created and organized under and by virtue of certain acts of Congress of the United States and tendered a bond.

The question was made that the removal was improper because of the ruling laid down in the case of Tennessee *v.* Union and Planters' Bank and other cases, as the plaintiff's petition did not allege that the Texas and Pacific R'y was a Federal corporation, but on the contrary that it was a corporation created and existing under the laws of Texas. The Supreme Court held that it was properly removable, and announced that the rule did not apply to corporations created and organized under Federal authority.

The remaining question of whether or not the receiver Courtney was entitled to remove the case presents a new and interest-
59 ing question, one that as far as the researches of the court and counsel have gone has only been directly decided in one case and that in the circuit court of appeals of the eighth circuit in the case of The Wichita National Bank *v.* Smith, 72 Fed. Rep., page 568. That case was very briefly disposed of but is directly in point. Prior to the act of July 12th, 1882, national banks had a right to sue in the Federal courts because of their Federal origin, but by that act a limitation was put upon the jurisdiction of the Federal courts in such cases; it is provided, "That the jurisdiction over suits providing for national banking associations, except suits between them and the United States or its officers and agents, shall be the same and not other than the jurisdiction over suits by or against banks not organized under any law of the United States which might do business where such national banking associations may be doing business when such suits may be begun, and all laws or parts of laws of the United States inconsistent with this proviso be and the

same *is* hereby repealed." And by sec. 4 of the act approved March 3rd, 1887, it is provided "that all national banking associations established under the laws of the United States shall for the purpose of all actions by or against them, real personal or mixed, and all suits in equity, be deemed citizens of the estate in which they are respectively located, and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individuals, citizens of the same State. The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank."

It will be observed that the provisions of neither of these sections affect the jurisdiction of the courts of the United States in suits commenced by the United States or by direction of any officer thereof or for cases winding up the affairs of any such bank. There is no provision of the national banking act which in express terms directs the bringing of suits by receivers appointed by the comptroller, but before the passage of the act of 1882 or the act of 1887, the right of a receiver to bring a suit either in his own name or that of the national banking association had been recognized. The provision in regard to the appointment of the receiver by the Comptroller of the Currency is quite broad and the duties incumbent upon the receiver are thus stated in the act: "Such receiver under the direction of the comptroller shall take possession of the
60 books, records and assets of every description of such association and collect all debts due and claims belonging to it, and upon the order of a court of record of competent jurisdiction may sell or compound all bad debts or doubtful debts, and on a like order may sell all real and personal property of such association on such terms as the court may direct, and may, if necessary, to pay the debts of such association, enforce the individual liability of stockholders; such receiver shall pay over all moneys so made to the Treasurer of the United States subject to the order of the comptroller, and also make report to the comptroller of all the acts and proceedings." The provision in regard to the distribution of the assets is this: "From time to time after full provision has been made for refunding to the United States any deficiency for redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proven to his satisfaction or adjudged in a court of competent jurisdiction, and as the proceeds of the assets of such association are paid over to him shall make further dividends on all claims previously proved or adjudicated; the remainder of the proceeds if any shall be paid to the shareholders of the association or their legal representatives in proportion to the stock by them respectively held."

There are other provisions of the national banking law which authorize the forfeiture of the charter of the bank, but in the case at bar there is no suggestion that the charter of the German national bank has been forfeited, and it is now insisted by the plaintiffs that

the German national bank is the only necessary party in determining whether or not the claim sued for should be adjudged against that company. It seems to be decided by the cases that had this suit proceeded in the State court without the intervention of the receiver that such a judgment would be a valid one as against the corporation. This view seems to be sustained by the case of The National Bank of Bethel *v.* Pahquioque, 14 Wall., 383; Commonwealth *v.* Mechanics' National Bank, 94 U. S., 437, and Denton *v.* Baker (C. C. A., ninth circuit), 79 Fed. Rep., 189. This also seems to have been the ruling as against the assignee in bankruptcy under the late bankrupt act; see Eyster *v.* Goff, 91 U. S., 521, and 93 U. S., 130. The national banking act provided that claims against the insolvent national banks shall be approved to his (the comptroller's) satisfaction, or adjudged in a court of competent jurisdiction. As an original proposition we should be inclined to think that an adjudication in a court of competent jurisdiction would necessarily require that the re-
61 ceiver or the comptroller should be a party thereto. But conceding that neither of them are indispensable or necessary parties, we think the receiver is a proper party to this litigation, and as he has been allowed to be made a party in the State court the enquiry arises whether or not, as he derives his authority as does the comptroller entirely from the laws of the United States he is entitled to remove to this court. There is no provision in the national banking act which requires in terms the receiver to defend actions against the national bank for which he is receiver; that duty would necessarily follow if the bank for which he is receiver had forfeited its charter or ceased to exist as a corporation, since such forfeiture would be an abatement of any pending action, if properly presented, and would prevent any new suit which might have for its object the adjudication of contested claims. In the case of The Commercial Bank *v.* Hartford Deposit Bank, 161 U. S. I., on a writ of error from the supreme court of Illinois, the supreme court sustained a judgment against a bank, in a suit which was against both the receiver and the bank of which he was receiver, for the breach of the terms of a lease. The State court there adjudged that the receiver was not liable for the damages for the breach of the lease, but gave judgment against the banking association. This judgment was sustained by the supreme court, thus holding, as we think, that although the corporation had ceased to do business, and had ceased to be a going concern, that it was liable to be sued and a judgment rendered against it for a claim which existed at the time of the insolvency, and that such a judgment in the State court was a valid judgment, and "an adjudication in a court of competent jurisdiction" under the national banking act.

In an instance like the case at bar, where the corporate franchise has not been declared forfeited, the corporation, however, has no control of its assets, which have been taken by authority of the United States, nor has it any authority over the question of the double liability of the stockholders. The control of the assets is in the receiver and the authority to assess the liability against the

stockholders rests with the comptroller, who is appointed under the Federal law. It however does represent the stockholders to the extent of any remaining assets after the payment of the debts and liabilies of the insolvent corporation. As the receiver is the executive officer who controls the assets of the insolvent corporation and who is the representative in a sense of the comptroller, who
62 has a right to assess the stockholders, it is eminently proper that he should be made a party, though, perhaps, under the authorities, not a necessary one in the question of adjudicating the liability of the insolvent corporation. It is now settled that a receiver of an insolvent national bank is an officer of the United States. See Gibson *v.* Peters, 150 U. S.; Kennedy *vs.* Gibson, 8 Wall.; Price *v.* Abbott, 17 Fed. Rep., and Hendee *v.* R. R., 26 Fed. Rep. In Price *v.* Abbott, Justice Gray, after referring to sec. 2, art. 2, of the Constitution, in regard to the appointment of officers, says: "Appointments of receivers of national banks made by the Comptroller of the Currency as provided by those laws, are presumed to be made with the concurrence or approval of the Secretary of the Treasury, and made by the head of the department within the meaning of the Constitution." Assuming then that Courtney is a proper party, though not a necessary one, the question arises whether the case has been properly removed. The proviso of the act of March, 1887, is that the jurisdiction of the courts of the United States is not affected in cases commenced by the direction of any officer of the United States or in cases for winding up the affairs of any insolvent national bank. This suit is not commenced by direction of the receiver but is against the bank and the receiver—nor is it in terms a case for winding up the affairs of the German national bank; but it is we think a case which directly affects the winding up of the affairs of the German national bank. The many cases cited by counsel, in which the jurisdiction of the receiver to sue in the Federal court is recognized are cases in which he, the receiver, is suing and collecting the assets of the insolvent national bank. It would however upon general principles seem to follow that *if* the receiver could bring suits in regard to the assets against the claims of others, even though the claim against the insolvent bank was set up in an independent suit. But however this may be it seems to us that the language of the proviso in regard to winding up the affairs of such bank is sufficiently broad to include a suit like this, since it is indispensable to the winding up of the affairs of the bank that the assets of the insolvent should be defended against asserted liabilities as well as that the assets should be collected and be properly distributed. I conclude therefore that whilst the State court is a court of competent jurisdiction to adjudicate upon disputed claims against insolvent national banks in the hands of receivers, yet when the receiver is before the court representing as he does all of the assets of the insolvent bank, he can defend in that court or have the case removed to the United States court.

63 I do not understand that the rule which requires when the ground is diverse citizenship that the diverse citizenship should exist not only at the time of the removal but at the time of

the commencement of this suit, applies when the ground for removal is that the controversy arises under the laws of the United States, or that the right of removal is because the removing party is an officer of the United States and intervenes as such, and certainly it should not apply if this case is one under the head of winding up the affairs of this bank.

It follows from these views that the motion to remand must be overruled and it is so ordered.

And on the 28th day of February, 1898, came the complainant, by counsel, and on his motion, it is ordered that he do have until April rules 1898 to reform his bill of complaint herein.

And on the 4th day of April, 1898, came the complainants by counsel, and tendered their reformed bill of complaint herein, and moved the court to file the same.

And on the 14th day of April, 1898, came the parties by their counsel, and by consent it is ordered that the reformed bill herein, tendered April 4th, 1898, be and the same is hereby now filed.

The reformed bill above referred to is as follows:

Circuit Court of the United States, Sixth Circuit and District of Kentucky.

A. J. SPECKERT ET AL., Complainants,
vs.
GERMAN NATIONAL BANK ET AL., Defendants.

Reformed Bill of Complaint.

To the honorable the judges of the circuit court of the United States for the sixth circuit and district of Kentucky, sitting at Louisville:

Your orators, A. J. Speckert, Jacob Frankel, Harriett Frankel, Lewis R. McCleery, W. E. Glover, W. L. Lyons, Aaron Kohn,
64 John Unz, Philip Ackerman, F. J. Renz, and Andrew Krebs, for themselves and all others of the same class to which they belong, saving and reserving their and each of their exceptions and objections to the action of this court in overruling their motion to remand this cause to the State court, and now reforming their complaints herein, to conform to the rules of this court, complain of the defendants, German National Bank, R. H. Courtney, receiver, of the German national bank, Adolph Reutlinger, Albert Reutlinger, Moses Schwartz, Louisville Deposit Bank, Germania Safety Vault & Trust Co., assignee of the Louisville Deposit bank, D. W. Sanders, receiver of the R. B. Cotter Lumber Co., Senn & Ackerman Brewing Co., and Charles Buddhu, and complaining respectfully represent that defendant, German National Bank is now, and was at the dates of the grievances hereinafter set forth, duly chartered and organized as a na-

tional bank, accordingly as required by law; and that the defendants, Adolph Reutlinger and Albert Reutlinger were respectively its president and assistant cashier; that the defendant The Louisville Deposit Bank, was chartered by an act of the legislature of Kentucky, entitled "An act to incorporate the Louisville Deposit bank," approved March 30th, 1888, and was organized and launched as a bank on March 30th, 1891, under the facts and circumstances hereinafter set forth; that the Germania Safety Vault & Trust Co. was then and is a corporation duly chartered and organized by law, with power, among other things, to accept and administer trusts, including general assignments for the benefit of creditors, and as such was made assignee of the said Louisville Deposit bank on July 25th, 1893, as hereinafter stated; and that the defendants Senn & Ackerman Brewing Co. and R. B Cotter Lumber Co. were and are private corporations, duly created by law; and the defendant D. W. Sanders, was duly appointed and qualified by the Jefferson circuit court receiver of the said R. B. Cotter Lumber Co., that on the — day of January, 1897, the defendant R. H. Courtney, was duly appointed by the Comptroller of the United States Treasury, and qualified as receiver of the said German national bank and on the 28th day of June, 1897, on his own application and over the objections of your orators, intervened and became a party to this action while pending in the State court, from which it was removed to this court.

And now reforming their said complaints to conform to the order of this court, and further complaining, your orators state
65 that prior to March 30th, 1891, the defendants, German National Bank, Adolph Reutlinger and Albert Reutlinger, had gotten control of the charter of the then unorganized Louisville Deposit bank; that at that time, and for a number of years prior thereto, the said three-named defendants, and each of them, were intimately connected and associated in business with defendant Moses Schwartz; that the said defendant Moses Schwartz was then and had continuously been, for more than a dozen years, the principal borrowing customer of the said German national bank, in which bank the said Adolph Reutlinger and Albert Reutlinger were then large stockholders; that the capital stock of the said German national bank was then and is now two hundred and fifty thousand dollars and that on and prior to March 30th, 1891, the defendant Moses Schwartz was indebted and liable to said bank, for borrowed money, in at least the aggregate sum of two hundred and twenty-three thousand dollars.

Your orators state that the said Moses Schwartz had been for a long time prior to March 30th, 1891, was then and continuously thereafter hopelessly insolvent, which fact was then and at all times after January, 1890, well known to the said defendants German National Bank, Adolph Reutlinger and Albert Reutlinger.

Your orators state that the said German national bank, Adolph Reutlinger and Albert Reutlinger, realized that unless they could unload their claims against Moses Schwartz on others, the said bank and said Albert and Adolph Reutlinger would lose all or nearly all of the claims they held against the said Moses Schwartz,

and with full knowledge of this fact, united with said Moses Schwartz, and secured his consent and co-operation to use the charter of the said Louisville Deposit bank, and to procure subscribers to its stock and organize it as an independent bank, with the said Moses Schwartz, as its president and chief officer. They state that said German national bank, through its said president and said assistant cashier and the said Adolph Reutlinger, Albert Reutlinger and Moses Schwartz, with the view of unloading their claims against the said Moses Schwartz, as aforesaid, combined, colluded, confederated and conspired together with the fraudulent purpose to organize, launch and float the said Louisville Deposit bank, with the said Moses Schwartz as its chief officer, with the intent and purpose to unload upon it the indebtedness they and each of them held against the said Moses Schwartz and to apply and pay to the said German national bank, in payment of
66 its said worthless claims against said Moses Schwartz, as well as to themselves, in settlement of their claims against him, the money paid in by the subscribers to the capital stock of the said Louisville Deposit bank, in event of the success of their said scheme.

Your orators state that immediately after agreeing among themselves upon the aforesaid fraudulent scheme for realizing upon and collecting the said worthless claims held by the said German national bank and the said Adolph and Albert Reutlinger, against the said Moses Schwartz and of enabling the said Adolph and Albert Reutlinger to realize as much as possible on their stock in the said bank, as well as on their respective interests in collateral schemes and enterprises promoted and headed by the said Moses Schwartz, the said defendants, German National Bank, Adolph Reutlinger, Albert Reutlinger and Moses Schwartz, assisted by other officers and directors of the said German national bank, actively put on foot and started the organization of the Louisville Deposit bank, by subscribing or pretending to subscribe to stock therein, as follows:

Albert Reutlinger, ass't cashier, German national bank.	$15,000 00
Rudolph Reutlinger, cashier of the German national bank	10,000 00
C. W. Kelly, director in the German national bank....	10,000 00
Moses Schwartz.....	25,000 00

The aforesaid Albert Reutlinger and Rudolph Reutlinger, are sons of said Adolph Reutlinger, and the said C. W. Kelly was then a large stockholder of and a director in the said German national bank.

Your orators state that thereupon the said German national bank, through its officers and directors, especially through its president and assistant cashier aforesaid, and the said Adolph Reutlinger, Albert Reutlinger and Moses Schwartz, individually did unlawfully and fraudulently conspire, for the purposes aforesaid, to induce your orators and others of the same class with them, to subscribe and pay for capital stock in the said Louisville Deposit bank,

and in order to induce your orators and others of the same class with them to subscribe for such stock, they and each of them, did falsely and fraudulently represent to your orators and such others, that there was a fine opening for said new bank in the city of Louisville; that the said Moses Schwartz was an ideal man for the head of such a bank, and possessed of large
67 means, especially fitted and financially able to be the head and to conduct the business of the said bank; that the said Moses Schwartz had been one of the largest and most valued customers of the said German national bank of at least seventy-five thousand dollars cash, and also had in New York banks, to his credit a running monthly deposit balance of from fifty to seventy-five thousand dollars; that the said Schwartz owed very little money and was possessed of collaterals pledged to secure such indebtedness more than sufficient to pay the same, and was readily worth from two hundred to three hundred thousand dollars, over and above all of his debts and liabilities.

And your orators state that the said defendants further represented to your orators and their associates, to induce them to subscribe and invest their money in said venture; that the charter of the German national bank would expire in a short time, and that their object in getting up this bank was to consolidate its business with that of said new bank upon the expiration of its said charter.

Your orators state that they and each of them and a large number of others of the same class of subscribers as your orators, relying on the aforesaid representations as and believing them and each of them to be true, were induced thereby to subscribe, and did subscribe and pay for stock in said new bank, at par, as follows:

A. J. Speckert, 25 shares	$2,500 00
Jacob Frankel, 25 shares	2,500 00
Harriett Frankel, 25 shares	2,500 00
L. R. McCleery, 2 shares	200 00
W. E. Glover, 3 shares	300 00
W. L. Lyons, 25 shares	2,500 00
Frank Speckert, 20 shares	2,000 00
Aaron Kohn, 100 shares	10,000 00
John Unz, 10 shares	1,000 00
Phillip Ackerman, 10 shares	1,000 00
F. J. Renz, 6 shares	600 00
Andrew Krebs, 10 shares	1,000 00

of all of which stock they became, and have ever since been, and are now the owners and holders.

Your orators state that a large number of others of the same class were similarly induced to subscribe and pay for stock in said corporation, who have a common interest in the subject-matter of this action with your orators, and who are so numerous and scat-
68 tered that it is impracticable to bring them all before the court within a reasonable time.

Your orators state that the said defendants in this manner succeeded in inducing your orators and such others of the same class

with your orators, to subscribe and pay for two hundred and forty thousand dollars of the capital stock of the said Louisville Deposit bank, exclusive of their own subscriptions of sixty thousand dollars as aforesaid, and so it was that the Louisville Deposit bank was organized on March 30th, 1891, with the said Moses Schwartz as its president.

Your orators state that the said Moses Schwart- continued to hold the office of president of the said Louisville Deposit bank from its organization until July 5th, 1893, when it suspended and made a voluntary assignment for the benefit of its creditors to the Germania Safety Vault & Trust Co., which duly qualified and has ever since been acting as such assignee.

Your orators state that immediately after the organization of the Louisville Deposit bank, as aforesaid, the said German national bank and Adolph Reutlinger and Albert Reutlinger and Moses Schwartz commence- and systematically continued until the making of the said assignment, to unload upon the Louisville Deposit bank the worthless papers and claims held by the German national bank against the said Moses Schwartz, and the worthless papers and claims held by the said Adolph Reutlinger and Albert Reutlinger against the said Moses Schwartz, and by the connivance and collusion of the said Moses Schwartz with the said German national bank and the said Adolph and Albert Reutlinger, and without the knowledge and consent of your orators, the money raised and contributed by your orators and their associates as capital stock aforesaid, was fraudulently diverted, spoliated and used to pay the worthless claims and debts due by the said Schwartz to the said German national bank and to said Adolph Reutlinger and Albert Reutlinger.

Your orators state that the aforesaid representations, and each of them, made by the said defendants as aforesaid, to them and their associates to induce them to subscribe and pay for the said stock were false, and known by the said defendants at the time to be false; that the said Moses Schwartz was insolvent at the time and known by the said defendants to be insolvent, and the said Louisville Deposit Bank scheme was a mere device, gotten up and executed by the said defendants to enable them and each of them
69 to spoliate the capital stock paid in by your orators and their associates by applying the same to the pretended purchase and payment of the worthless claims held by the German national bank, and by the said Adolph and Albert Reutlinger against the said Moses Schwartz.

Your orators state that very little, if any, part of the sixty thousand dollars of the said stock subscribed for by the aforesaid named officers of the German national bank and Moses Schwartz was ever paid in by them, or any one for them. That very soon after the organization of the Louisville Deposit bank as aforesaid, the said officers of the German national bank secretly went through the form of selling and transferring to the said Moses Schwartz at a premium, their interest in the said thirty-five thousand dollars of stock subscribed by them as aforesaid, well knowing at the time that the said Moses Schwartz was insolvent and unable to pay for the said stock,

and they fraudulently procured the said Moses Schwartz to pay them for the said stock, together with the premium thereon, out of the capital contributed by your orators and their associates in the payment of their subscriptions as aforesaid.

Your orators say that the funds contributed by them to the capital stock of the Louisville Deposit bank, in payment of their respective subscriptions as aforesaid, constituted a trust fund, which was not liable for any of the debts or obligations of the said Moses Schwartz to the said German national bank and to said Adolph and Albert Reutlinger, and was not liable for the subscriptions of the officers of the said German national bank to the capital stock of the said Louisville Deposit bank, and in equity and good conscience should not and could not have been lawfully used or appropriated by the said German national bank, Adolph Reutlinger and Albert Reutlinger and Moses Schwartz for any of such purposes.

Your orators do not know, and cannot say with exactness, how much of their said subscription funds were so used, spoliated and appropriated by the said German national bank, Adolph Reutlinger and Albert Reutlinger and Moses Schwartz, but on information and belief aver and charge that at least the sum of two hundred thousand dollars of their said subscriptions and payments on capital stock were so used and appropriated.

Your orators state that by reason of the fraudulent collusion, conspiracy, combination and machinations as aforesaid, of the said defendants, German National Bank, Adolph Reutlinger,
70 Albert Reutlinger and Moses Schwartz, the funds contributed by them were spoliated and depleted and said Louisville Deposit bank was ruined, and became insolvent, and was compelled to suspend, and on July 25th, 1893, made a general assignment of all of its property to the defendant, Germania Safety Vault & Trust Company for the benefit of its creditors, and that its assets have not paid anything, and will not pay more than five per cent. on the valid claims proven and asserted against it.

Your orators state that they did not learn or know, and could not, by the exercise of ordinary diligence, have learned or known of the aforesaid fraudulent conspiracy, machinations, scheme and spoliations of the said funds until after the making of the said assignment, and that soon after learning the said facts they demanded of the said assignee that it institute an action against the said defendants for an accounting, and redress of the grievances herein complained of.

Your orators state that at the date of the aforesaid general assignment of the said Louisville Deposit bank, for the benefit of its creditors to the Germania Safety Vault and Trust Co., and thereafter, until long after the institution of this action in the State court, the said Germania Safety Vault & Trust Co. was under the complete domination and control of the said German national bank; that the defendant, Adolph Reutlinger, was, during said time, the president of both of the said institutions, and that a majority of the directors of the said Germania Safety Vault and Trust Co. were at the same time, directors in the said German national bank. They

state that before the institution of this action they demanded of the said Germania Safety Vault & Trust Co., and its officers, that it, as the assignee of said Louisville Deposit bank as aforesaid, institute appropriate action against the said German national bank, Adolph Reutlinger and Albert Reutlinger, to obtain restitution of the funds of the said Louisville Deposit bank fraudulently diverted and misappropriated as aforesaid, which the said Germania Safety Vault & Trust Co. failed and refused to do, because of the conflicting interest of those in control of its affairs as aforesaid, and as it was that after first having exhausted all efforts to have said grievances asserted and redressed by the said assignee, your orators instituted this action in the State court.

Your orators state that at the date of the general assignment of the Louisville Deposit bank as aforesaid, the defendant, D. W. Sanders, as receiver of the R. B. Cotter Lumber Co. was a
71 depositor in the Louisville Deposit bank with a balance to his credit on its books of $34,436.28; and the defendant, Senn & Ackerman Brewing Co., was also such depositor, with a balance to its credit on the books of the said bank of $3,932.13; and the defendant, Charles Buddhu, was also such depositor, with a balance to his credit on the books of the said bank of $300.00.

Your orators say that there were many other depositors having balances to their credit on the books of the said bank at the time of the said assignment, amounting in the aggregate to a large sum, none of whom have yet been paid anything out of the estate assigned, and who are too numerous and widely scattered to make it practicable to bring all of them before the court within a reasonable time, and the above-named three defendants can, and should be allowed to represent themselves and all others of the class of depositors similarly situated and interested with them in the result of this litigation.

Your orators say that because of the specific frauds committed on them in the conception, formation, organization and execution of the said fraudulent scheme and conspiracy to use the funds contributed by them as aforesaid, to buy the worthless claims held by the said defendants, German National Bank, Adolph Reutlinger and Albert Reutlinger, against the said Moses Schwartz, as aforesaid, to the extent that they can trace the said funds in the accomplishment of the said scheme, they are, in equity and good conscience, entitled to priority thereto, but the said depositors claim priority over the stockholders to the benefit of any recovery herein, and for that reason they are made defendants herein, and called upon to assert their claims, if any they have, or be forever barred.

Your orators state that on the — day of ——, 1897, and within three months after the appointment of the defendant, R. H. Courtney, as receiver of the defendant, German National Bank, as aforesaid, they made out, presented and lodged with the said receiver, in manner and form as required by law, written proofs of their aforesaid demands and grievances and of the pendency of this suit, and demanded that the said receiver list the same among the claims asserted against the said German National Bank in his hands, and

withhold from distribution a sufficient amount of the said estate to provide therefor in the event of the final adjudication and allowance of the said claims.

Your orators state that in equity and good conscience they are entitled to an accounting from the defendants, German National Bank, Adolph Reutlinger and Albert Reutlinger, to the end
72 that they, and each of them, should be compelled to account and pay over the funds contributed by your orators and their associates to the extent, at least, of the benefits unlawfully received by them therefrom in the execution of their fraudulent scheme and conspiracy aforesaid, together with interest thereon from the times such funds were so unlawfully received by them.

Your orators state that the affairs and accounts between the said defendants touching the claims unloaded by them as aforesaid, have been and are in a complicated condition, and cannot be dealt with adequately in a court of law and that defendants, German National Bank, Adolph Reutlinger and Albert Reutlinger, should be compelled to make full disclosures and discovery of the accounts and books within their control, or within their knowledge, pertaining thereto.

Wherefore, the premises considered, and forasmuch as your orators are remediless at and by the strict rules of the common law in the premises, and can only have adequate relief in a court of equity where matters of this nature are properly cognizable and relievable, and to the end that your orators and their associates may have that relief, which they can obtain only in a court of equity, and avoid a multiplicity of suits, they pray that they may be allowed to prosecute this action for and in behalf of all other stockholders similarly induced to subscribe to the capital stock of the Louisville Deposit bank as they were induced to subscribe, and that the defendants D. W. Sanders, receiver of the R. B. Cotter Lumber Co., Senn & Ackerman Brewing Co., and Charles Buddhu, be appointed and designated to represent themselves and all depositors of the Louisville Deposit bank similarly situated with them in the premises, and your orators pray that the said defendants, and each of them, may be compelled to answer the premises herein, but not under oath, the benefit of oath being expressly waived by your orators herein and that an accounting may be ordered, had and taken by and under the direction and decree of this honorable court of the moneys and trust funds so unlawfully diverted and spoliated in the execution of the fraudulent scheme and conspiracy asserted herein, and that it may be declared and decreed by this court that the said moneys unlawfully and fraudulently received by the said defendants aforesaid may be declared and held to be a trust fund for the use and benefit of your orators and others for whom they sue, and that your orators have a decree for the moneys found to be due them in the premises, and for all such other and further relief in the premises as equity and good conscience and the nature of the case may require.

73 And your orators will ever pray, &c.

BYRON BACON,
DODD & DODD,
E. MACPHERSON,
DAVID W. BAIRD,
Solicitors for Complainants.

COMMONWEALTH OF KENTUCKY, *Jefferson County,* } *ss:*

F. J. Renz and J. Frankel, being duly sworn depose and say that they are complainants in the foregoing reformed bill of complaint, and know the contents thereof, and that the same are true of their own knowledge except as to matters and things stated to be on information and belief, and as to those matters they believe them to be true.

F. J. RENZ.
J. FRANKEL.

Subscribed and sworn to before me, by F. J. Renz, and J. Frankel, this 16th day of March, 1898.

My commission expires Jan'y, 1900.

SAM'L A. LEDERMAN,
Notary Public, Jefferson County, Kentucky.

And on the 6th day of June, 1898, came R. H. Courtney, receiver of the German National Bank, defendant herein, by counsel, and filed his demurrer to the complainants' bill of complaint herein.

The demurrer above referred to is as follows:

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

The demurrer of the German National Bank and R. H. Courtney, receiver of said bank, to the bill exhibited against them and other defendants by A. J. Speckert, Jacob Frankel, Harriett Frankel, Lewis R. McCleery, W. E. Glover, W. L. Lyons, Aaron Kohn, John Unz, Philip Ackerman, F. J. Renz, and Andrew Krebs.

These defendants by protestation not confessing or acknowledging all or any part of the matters and things in the said bill of complaint contained to be true in manner and form as the same are therein set forth do demur thereto and for causes of demurrer show:

1. That the said complainants have not in and by their
74 said bill stated such a case as does or ought to entitle them to any such discovery or relief as is thereby sought and prayed for from or against these defendants.

2. That if the matters and things stated in said bill do give the said complainants any cause of complaint against these defendants or either of them, the same is triable and determinable by law, and ought not to be inquired of by this court.

3. That it appears by said bill that the same is exhibited against these defendants for several distinct matters and causes in favor of several complainants who have no joint or common interest or concern in the said matters and causes, or in any one of them.

Wherefore these defendants demand the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said bill or any of the matters and things therein contained and pray to be hence dismissed with their reasonable costs in this behalf sustained.

I hereby certify that the foregoing demurrer is in my opinion well taken in point of law.

J. G. CARLISLE,
Counsel for the said Defendant.

R. H. Courtney being duly sworn, deposes and says I am one of the above-named defendants. The above demurrer is not interposed for delay.

R. H. COURTNEY,
Receiver German National Bank.

COMMONWEALTH OF KENTUCKY, }
County of Jefferson. }

Sworn to before me this 1st day of June, 1898.

JNO. J. FLYNN,
Notary Public, J. C.

[SEAL.]

My commission expires Jan. 15, 1902.

And on the 31st day of October, 1898, came the parties by their counsel. The court being now fully advised of the demurrer of the defendants The German National Bank and R. H. Courtney, receiver, to the bill of complaint herein, filed an opinion, and in accordance therewith, it is ordered, adjudged and decreed that the said demurrer be and it is hereby sustained.

Said opinion above referred to is as follows:

75 United States Circuit Court, District of Kentucky.

A. J. SPECKERT and Others }
vs.
THE GERMAN NATIONAL BANK and Others. }

Opinion on Demurrer.

The German National Bank and R. H. Courtney, receiver, have filed a demurrer to the reformed bill herein. The grounds of the demurrer are: (1) That the complainants have not, in and by their said bill, stated — a case as does or ought to entitle them to any discovery or relief as is thereby sought and prayed for from or against these defendants; (2) if there is any cause of action stated the remedy is at law; (3) that it appears by said bill that the same

is exhibited against these defendants for several distinct matters and causes in favor of several complainants who have no joint or common interest or concern in said matters or causes or any one of them.

Counsel for the demurrants insist that the reformed bill sets up a claim in favor of complainants, Speckert and other stockholders, of the same class in the Louisville Deposit bank, and that they seek to recover from the defendants certain specified sums of money which they allege were paid by them respectively upon the fraudulent and false representations of the defendants, The German National Bank and the Reutlingers, by which they were induced to become stockholders in the Louisville Deposit bank. That these representations were made by the defendants, The German National Bank, and the Reutlingers in pursuance of a fraudulent scheme which the said bank and the Reutlingers and one Moses Schwartz had theretofore entered into, by which the Louisville Deposit bank was to be organized, and when organized to be under the control of the said Moses Schwartz and others, and that the said Schwartz was to use the assets of said Louisville Deposit bank to pay his debts, which he owed at the time of the said fraudulent scheme between him and the said German national bank and the Reutlingers, to said German national bank, and said Reutlingers, the said Moses Schwartz being insolvent and debts against him of little value, which was known to the said bank, and the said Reutlingers, at the time of the conspiracy and at the time of the representations made to the complainants and other stockholders of their class.

76 The demurrants further insist that the complainants and those stockholders of their class seek to trace the money thus paid by them for the stock of the Louisville Deposit bank through said bank into the German national bank and to the said Reutlingers; and that this bill is solely for the benefit of the complainants and other stockholders who had been similarly defrauded by the false representations of said German national bank and said Reutlingers.

Counsel for the complainants on the other hand insist that the reformed bill is not brought for the purpose of recovering for Speckert and other stockholders of the Louisville Deposit bank of their class, but is a claim for a recovery for and on behalf of the Louisville Deposit bank itself and for the benefit of all of its stockholders, and is brought by the complainants because the Germania Safety Vault and Trust Company, the assignee of the Louisville Deposit bank, has refused to bring such a suit, and that bank before it became insolvent was under the control and domination of the conspirators, and, therefore, would not bring such a suit, and that the allegations in regard to the false and fraudulent representations made to complainants and other stockholders of their class, by which they were induced to become stockholders in the Louisville Deposit bank, are simply allegations showing the fraudulent scheme of the said defendants, the purpose of which was to fraudulently get the assets of the Louisville Deposit bank, in payment of the worthless debts the defendants had against said Moses Schwartz.

We have examined carefully the reformed bill and conclude that it is either an effort on the part of the complainants to recover from the defendants, The German National Bank and the Reutlingers, certain sums for the benefit of themselves and of the class of stockholders of the Louisville Deposit bank to which they allege they belong, to wit, those who were induced to take stock in the Louisville Deposit bank by the fraudulent representations of the German national bank and the Reutlingers, set up in the bill; or the bill is an effort to unite such a claim by complainants, as stockholders, and their class, with a claim for the benefit of the Louisville Deposit bank, and all of its stockholders and creditors. Thus the bill after setting out the fact that Moses Schwartz was largely indebted to the national bank and also indebted to the Reutlingers, and was insolvent, and was known to be by the bank and the Reutlingers, and alleging the conspiracy to organize the Louisville Deposit bank and control it with a view of getting Schwartz's debts paid
77 out of the assets of the bank, when organized and in operation, then makes this allegation:

"Your orators state that thereupon the said German national bank, through its officers and directors, especially through its president and assistant cashier, aforesaid, and the said Adolph Reutlinger, Albert Reutlinger, and Moses Schwartz, individually, did unlawfully and feloniously conspire, for the purposes aforesaid, to induce your orators and others of the same class with them, to subscribe and pay for capital stock in the said Louisville Deposit bank, and in order to induce your orators and others of the same class with them to subscribe for such stock, they, and each of them, did falsely and fraudulently represent to your orators and such others, that there was a fine opening for said new bank in the city of Louisville; that the said Moses Schwartz was an ideal man for the head of such a bank, and possessed of large means, especially fitted and financially able to be the head and to conduct the business of said bank; that the said Moses Schwartz had been one of the largest and most valued customers of the said German national bank for a period of over 15 years; that said Schwartz had a running monthly deposit balance with said German national bank of, at least, seventy-five thousand dollars cash, and also had in New York banks, to his credit a running monthly deposit balance of from fifty to seventy-five thousand dollars; that the said Schwartz owed very little money, and was possessed of collaterals pledged to secure such indebtedness more than sufficient to pay the same, and was readily worth from two hundred to three hundred thousand dollars over and above all his debts and liabilities.

And your orators state that the said defendants further represented to your orators and their associates, to induce them to subscribe and invest their money in said venture, that the charter of the German national bank would expire in a short time, and that their object in getting up this bank, was to consolidate its business with that of said new bank, upon the expiration of its said charter.

And your orators state that they and each of them, and a large

number of others of the same class of subscribers as your orators, relying on the aforesaid representations as and believing them and each of them to be true, were induced thereby to subscribe, and did subscribe and pay for stock in said new bank, at par, as follows:"

(Then follows a list of the several complainant stockholders with the amounts subscribed, amounting to $26,000.)

78 "Your orators state that a large number of others of the same class were similarly induced to subscribe and pay for stock in said corporation who have a common interest in the subject-matter of this action with your orators."

The bill makes D. W. Sanders, who is receiver of the R. B. Cotter Lumber Company, who is alleged to be a large depositor of the Louisville Deposit bank, at the time of its failure, and two others, depositors of the Louisville Deposit bank, defendants, and asks that they be required to represent the depositors of the said Louisville Deposit bank. It is alleged in another part of the bill thus:

"Your orators say that because of the specific frauds committed on them in the conception, formation, organization and execution of the said fraudulent scheme and conspiracy, to use the funds contributed by them as aforesaid, to buy the worthless claims held by the said defendants, German National Bank, Adolph Reutlinger and Albert Reutlinger, against the said Moses Schwartz, as aforesaid, to the extent that they can trace the said funds in the accomplishment of the said scheme, they are in equity and good conscience, entitled to priority thereto, but the said depositors claim priority over the stockholders to the benefits of any recovery herein, and for that reason they are made defendants herein and called upon to assert their claims, if any they have, or be forever barred."

The prayer of the bill is that a court of equity take cognizance "to the end that your orators and their associates may have that relief which they can only obtain in a court of equity, and avoid a multiplicity of suits, they pray that they be allowed to prosecute this action for and in behalf of all other stockholders similarly induced to subscribe to the capital stock of the Louisville Deposit bank, as they were induced to subscribe, and that the defendants, D. W. Sanders, receiver of the R. B. Cotter Lumber Company; Senn & Ackerman Brewing Company, and Charles Buddhu" (who were the other depositors), "be appointed and designated to represent themselves and all depositors of the Louisville Deposit bank similarly situated with them in the premises * * * and that an accounting may be ordered, had and taken by and under the direction and decree of this honorable court, of the moneys and trust funds so unlawfully diverted and spoliated in the execution of the fraudulent scheme and conspiracy asserted herein, and that it may be declared and decreed by this court that the said moneys unlawfully and fraudulently received by the said defendants aforesaid may be declared and held to be a trust fund for the use and benefit of your orators and others for whom they sue, and

79 that your orators have a decree for the moneys found to be due them in the premises."

It seems to us quite plain from these allegations and others in

the bill that the purpose is to claim for the complainants and others of their class who were stockholders in the Louisville Deposit bank, and induced to become stockholders by the fraudulent representations, a priority not only over other stockholders of the Louisville Deposit bank but of the creditors of the said bank. If this were not the purpose it was entirely unnecessary and improper to have made the depositors of the Louisville Deposit bank parties; they could only be proper parties upon the theory that each of the stockholders had been induced to part with the amount of money which they paid for the stock in the Louisville Deposit bank, and that the money was being traced through the Louisville Deposit bank into the hands of the German national bank and the Reutlingers, and because of the fraudulent representations by the conspirators to the complainants they would be entitled to the specific sums which they had been defrauded out of by the conspirators and by the means alleged, which would give them a priority not only over other stockholders of the Louisville Deposit bank, but also over its creditors. If this be the proper construction of the reformed bill then it cannot be maintained in equity by them because, as we think, each individual stockholder in the Deposit bank had a separate action at law against the parties who are alleged to have defrauded them; and for the further reason that when they became stockholders of the Louisville Deposit bank by the means alleged and paid the money for the stock and received the stock, the money became part of the assets of the Louisville Deposit bank and a court of equity should not take jurisdiction upon the theory that the money could be traced through the Louisville Deposit bank into the hands of the German national bank and the Reutlingers, and there subjected to the specific claim of the complainants. Such a remedy as this would involve the cancellation of the stock of the complainants as against the Louisville Deposit bank, and an adjudication returning the money paid therefor, and this being done, to follow the money which had come into the possession of Moses Schwartz and paid over to the German national bank and the Reutlingers by him in presence of the fraudulent conspiracy. There is no allegation in the bill which makes the Deposit bank or the other stockholders who were not induced to become stockholders by the fraudulent representations of the conspirators, or the creditors of the Deposit bank, participants in the alleged fraud, or in any way responsible therefor.

80 There are quite a number of allegations in the bill which would indicate the purpose to claim by and under the Louisville Deposit bank for the frauds which are alleged to have been committed against it. Thus is alleged the failure of the Deposit bank and its assignment of all of its assets to the Germania Trust Company, and that the bank was therefore its assignment under the control of the conspirators, and further that a demand had been made upon the assignee to whom the assets had been assigned, to bring the suit and that this had been refused. And there are other allegations not necessary to quote, indicating an intention to endeavor to recover by and through the Louisville Deposit bank.

We think these two alleged causes of action cannot be maintained in one bill, because the two are not in the same interest nor in same court, and the recovery, if had, would not be all to the same parties; indeed, the complainants as a class of stockholders present, as against the Louisville Deposit bank, and its stockholders generally and its creditors an adverse claim. Thus these complainants would, if they succeeded, as a class, have a priority and exclude the stockholders who had not been induced by the fraudulent representations of the defendants to take stock, and also a priority over the creditors of the Deposit bank.

It follows upon the construction first given that there is no equity in the bill, and upon the theory that the bill attempts to unite the two causes of action it is multifarious, and the demurrer should be sustained.

And on the 15th day of October, 1898, came the complainants by John L. Dodd, and the defendants, R. H. Courtney, receiver, and German National Bank, in liquidation, by W. M. Smith, and A. P. Humphrey, counsel; and by consent there is filed herein *nunc pro tunc* as of the 4th day of October, 1897, a stipulation hereto attached, marked "A."

Said stipulation is as follows:

Jefferson Circuit Court, Law and Equity Division.

A. J. SPECKERT ET AL., Plaintiffs,
vs.
GERMAN NATIONAL BANK ET AL., Defendants. } Stipulation.

It is hereby stipulated and agreed by and between the par-
81 ties to this cause that a partial transcript, including the pleadings and orders of court, may be made out and filed in the United States court, for the district of Kentucky at Louisville, and upon the filing thereof the plaintiffs will enter a motion to remand this cause to the State court; that if the said motion be decided adversely to the plaintiffs and parties joining in the same, then the party removing this cause from the State court to the Federal court shall complete the said transcript by copying and causing to be filed in the Federal court the many depositions now on file in the State court herein, including the depositions on file in the case of Sharpe *vs.* German National Bank, which, by stipulation herein, are to be read upon the hearing of this cause, the purpose of this stipulation is to have the question of the validity of the removal from the State court to the Federal court determined before requiring a complete transcript of the record as it exists in the State court filed in the Federal court.

BYRON BACON,
DODD & DODD,
KOHN, BAIRD & SPINDLE,
D. W. SANDERS,
Att'ys for Pl'ffs and Cross-pl'ffs.
HUMPHREY & DAVIE,
For R. H. Courtney, Receiver, and German National Bank, in Liquidation.

The above stipulation was extended by mutual consent until the demurrer to the reformed bill was passed on.

HUMPHREY & DAVIE,
For Courtney, &c.
JOHN L. DODD & OTHERS, *For Pl'ffs.*

And on the same day, to wit, on the 15th day of October, 1898, the complainants having declined to plead further, it is therefore ordered, adjudged and decreed that the complainants' bill of complaint herein, be and the same is hereby dismissed, and that the defendants recover of the complainants their costs herein expended.

And on the 18th day of November, 1898, came A. J. Specker-, Jacob Frankel, Harriett Frankel, Lewis R. McCleery, W. E. Glover, W. L. Lyons, Aaron Kohn, John Unz, Philip Ackerman, F. J. Renz, Andrew Krebs, D. W. Sanders, receiver of the R. B. Cotter
82 Lumber Company, Charles Buddhu and Senn & Ackerman Brewing Company, and filed their petition for an appeal herein, together with the assignment of errors, and upon their motion, it is ordered that an appeal be allowed herein, upon condition that the said parties shall execute an appeal bond herein in the penalty of four hundred dollars.

And thereupon came A. J. Speckert, Jacob Frankel, Harriett Frankel, Lewis R. McCleery, W. E. Glover, W. L. Lyons, Aaron Kohn, John Unz, Philip Ackerman, F. J. Renz, Andrew Krebs, D. W. Sanders, receiver of the R. B. Cotter Lumber Company, Charles Buddhu, and Senn & Ackerman Brewing Company, and presented said bond with David W. Baird, as security in the penalty of four hundred dollars conditioned as required by law, which bond is approved and said appeal allowed.

The petition for appeal, assignment of errors and bond above referred to are as follows:

Circuit Court of the United States for the District of Kentucky.

A. J. SPECKERT ET AL., Complainants,
vs.
GERMAN NATIONAL BANK ET AL., Defendants.

Petition of Complainants for an Appeal to the Circuit Court of Appeals and Their Assignment of Errors.

Your petitioners, A. J. Speckert, Jacob Frankel, Harriett Frankel Lewis R. McCleery, W. E. Glover, W. L. Lyons, Aaron Kohn, John Unz, Philip Ackermann, F. J. Renz, Andrew Krebs, D. W. Sanders, receiver of the R. B. Cotter Lumber Company; Charles Buddhu and Senn & Ackermann Brewing Company, for themselves and for the classes represented by them respectively complain of the orders and decree of the court herein and respectfully represent that the said orders and decree are erroneous in the following particulars among others, to wit:

I.

The court erred in overruling their motion to remand this cause to the State court.

II.

The court erred in retaining jurisdiction of this cause, in spite of the objections of your petitioners.

83 III.

The court erred in sustaining the demurrer of defendants to the reformed bill herein.

IV.

The court erred in dismissing their complaint and in adjudging costs against them.

Wherefore, your petitioners, for themselves and the classes represented by them, pray an appeal to the honorable circuit court of appeal- for the sixth judicial circuit, to the end that their aforesaid grievances may be inquired into, reviewed and revised in manner and form as provided by law.

DODD & DODD,
BYRON BACON,
D. W. BAIRD,
D. W. SANDERS,
E. MACPHERSON,
Attorneys for Petitioners.

Circuit Court of the United States for the District of Kentucky.

A. J. SPECKERT ET AL., Complainants,
vs.
GERMAN NATIONAL BANK ET AL., Defendants.

Bond for Appeal.

Know all men by these presents, that we, A. J. Speckert, Jacob Frankel, Harriet Frankel, Lewis R. McCleery, W. E. Glover, W. L. Lyons, Aaron Kohn, John Unz, Philip Ackerman, F. J. Renz, Andrew Krebs, D. W. Sanders, receiver of the R. B. Cotter Lumber Company; Charles Buddhu and Senn & Ackermann Brewing Company, as principals; and David W. Baird, as surety, are held and firmly bound unto the German National Bank, R. H. Courtney, receiver of the German national bank; Adolph Reutlinger and Albert Reutlinger, in the sum of $400.00 to be paid to said obligees, for the payment of which well and truly to be made we bind ourselves, and each of us, and our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 18th day of November, A. D. 1898.

84 Whereas, the above-mentioned principal obligors have prosecuted an appeal to the circuit court of appeals for the

sixth circuit to reverse the decree rendered in the above-styled suit by the circuit court of the United States for the sixth circuit, district of Kentucky; now, therefore, the condition of this obligation is such that if the above-named principal obligors shall prosecute said appeal to effect and answer all costs if they fail to make said appeal good, then this obligation shall be void, otherwise, the same shall be and remain in full force and virtue.

ANDREW KREBS,
D. W. SANDERS, *Receiver*,
CHARLES BUDDHU,
SENN & ACKERMANN BREWING CO.,
A. J. SPECKERT,
JACOB FRANKEL,
HARRIET FRANKEL,
LEWIS R. McCLEERY,
W. E. GLOVER,
W. L. LYONS,
AARON KOHN,
JOHN UNZ,
PHILIP ACKERMANN,
F. J. RENZ, *Principals*,
By BYRON BACON,
DAVID W. BAIRD,
DODD & DODD,
D. W. SANDERS, AND
E. MACPHERSON, *Attorneys, and*
DAVID W. BAIRD, *Surety*.

Approved and appeal granted this the 18th day of November, A. D. 1898.

JNO. W. BARR, *Judge*.

Attest: THOS. SPEED,
Clerk of U. S. Circuit Court for the District of Kentucky,
By HENRY F. CASSIN,
Deputy Clerk.

DISTRICT OF KENTUCKY, *ss*:

I, Thomas Speed, clerk of the circuit court of the United States for the district of Kentucky, at Louisville, Kentucky, do hereby certify that the foregoing ninety-four pages contain a true and correct transcript of the record in the case of A. J. Speckert *et al. vs.* German National Bank *et al.*, as the same appears from the files and records in my said office.

Witness my hand and seal of said court this 28 day of November, A. D. 1898.

[SEAL.] THOS. SPEED, *Clerk*.

Circuit Court of the United States for the District of Kentucky.

UNITED STATES OF AMERICA, }
Sixth Judicial Circuit. }

To the German National Bank, R. H. Courtney, receiver of the German national bank; Adolph Reutlinger and Albert Reutlinger, Greeting:

You and each of you are hereby cited and admonished to
85 be and appear at a session of the United States circuit court of appeals for the sixth judicial circuit to be holden at the city of Cincinnati in the said circuit, on a day not exceeding thirty days from the signing of this citation, pursuant to an appeal allowed by the circuit court of the United States for the district of Kentucky, wherein A. J. Speckert and others are appellants and you are appellees, to show cause, if any there be, why the error, if any, in the decree rendered against the said appellants, to correct which the said appeal is prosecuted, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States this the 18th day of November, A. D. one thousand eight hundred and ninety-eight, and of the Independence of the United States of America, in the one hundred and twenty-third year.

JNO W. BARR,
United States Circuit Judge.

Executed the within on Adolph Reutlinger by delivering a copy to him this 22d of November, 1898, and on Albert Reutlinger by delivering a true copy to him this 30th of Nov., 1898.

A. D. JAMES, *U. S. M.*,
By M. C. JAMES, *D. M.*

Fee.....	4 00
Exp.....	10
	4 10

Service of this citation is acknowledged this Nov. 18, 1898.

R. H. COURTNEY,
Receiver German National Bank,
Per W. M. SMITH AND
A. P. HUMPHREY.

No. 676. E. 178. A. J. Speckert *et al. vs.* German National Bank *et al.* Citation and two copies. Filed Dec. 1, 1898. Frank O. Loveland, clerk. W. O. and J. L. Dodd.

86 And afterwards, to wit, on March 28th, *1900*, a stipulation was filed in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

A. J. SPECKERT, &c., Appellants,
vs.
GERMAN NATIONAL BANK, &c., Appellees. } Stipulation.

It is agreed between the parties appellant and appellee herein that this cause may be passed until the May term of the court.

HUMPHREY & DAVIE,
For Appellees.

DODD & DODD,
Of Counsel for Appellants.

And afterwards, to wit, on April 4th, 1899, a stipulation was filed in said cause; which stipulation is in the words and figures as follow:

United States Circuit Court of Appeals for the Sixth Circuit.

A. J. SPECKERT ET AL., Appellants,
vs.
GERMAN NATIONAL BANK ET AL., Appellees. } Stipulation.

87 It is hereby mutually stipulated by counsel for the parties herein that the above-styled cause may be set for hearing to be called and heard upon the return of the court after its Detroit sitting, about the end of May, 1899.

DODD & DODD,
Counsel for Appellants.

HUMPHREY & DAVIE,
Counsel for Appellees.

And afterwards, to wit, on October 4th, 1899, an entry was put upon the journal, which is in the words and figures following:

United States Circuit Court of Appeals for the Sixth Circuit.

A. J. SPECKERT ET AL.
vs.
GERMAN NATIONAL BANK.

This cause is argued for appellants by Mr. John L. Dodd and by Mr. A. P. Humphrey for the appellees, and is submitted to the court.

And afterwards, to wit, on December 4th, 1899, a decree was entered in said cause, which reads and is as follows:

88 *Decree.*

United States Circuit Court of Appeals for the Sixth Circuit.

A. J. SPECKERT ET AL. v. GERMAN NATIONAL BANK. } No. 676.

Appeal from the circuit court of the United States for the district of Kentucky.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Kentucky and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, reversed and the cause remanded with directions to remand the same to the State court from whence it was removed, the receiver out of the funds in his hands to pay the costs in the circuit court and in this court.

89 And afterwards, to wit, on December 8th, 1899, an opinion was filed in said cause; which opinion reads and is as follows:

United States Circuit Court of Appeals, Sixth Circuit.

A. J. SPECKERT ET AL., Appellants, v. GERMAN NATIONAL BANK, Appellees. } No. 676. Appeal from the United States Circuit Court for the District of Kentucky.

Submitted October 4, 1899; decided December 4, 1899.

Before Taft, Lurton, and Day, circuit judges.

DAY, circuit judge, delivered the opinion of the court:

On April 4, 1894, the appellants commenced this action in the Jefferson circuit court of Kentucky against The German National Bank and others. The bill alleged that the defendants had entered into a conspiracy to induce the complainants to subscribe to stock in the Louisville Deposit bank, and, to that end, had made certain false and fraudulent representations in reference thereto. The Deposit bank had become involved and its assets had been diverted, as was alleged, to pay certain debts of one Moses Schwartz, who was charged as a co-conspirator with the German National Bank. On January 14, 1895, the answer of the German National Bank was filed. Proofs were taken and the cause prepared for trial. In January, 1897, the German National Bank was put into the hands of a receiver, by order of the Comptroller of Currency. On June 28, 1897, the receiver filed an application to be made a party to this

suit in the State court, which application was granted, and the receiver was duly made a party to the action. Thereupon the receiver filed a petition to remove the cause from the State court to the United States circuit court for the district of Kentucky. The State court made an order, granting the petition and accepting the bond.

October 4, 1897, on the filing of the transcript in the circuit
90 court of the United States for the district of Kentucky, plaintiffs moved to remand the case to the State court. On February 8, 1898, the court overruled this motion. Thereafter an amended bill of complaint was filed, which was demurred to by the German National Bank and the receiver. On October 3, 1898, the demurrer was sustained, and upon the 15th of the same month, plaintiffs having declined to plead further, the bill was dismissed.

Upon the appeal two questions are presented: Should the circuit court of the United States have maintained jurisdiction of the case? Second, should the demurrer to the bill as reformed have been sustained? We find it necessary to consider only the first of these questions. An elaborate and able argument has been made by counsel for appellees as to the rights of receivers of national banks to prosecute original actions in the Federal courts, and to remove cases commenced against them from the State to the Federal courts. We do not think it necessary to enter upon a consideration of the rights of receivers of national banks in such actions, and the only question presented of record which we deem it necessary to decide is whether a receiver, under the circumstances shown in this case, having been admitted as a party in the proceeding in the State court, has any right to remove the case. By the act of July 12, 1882 (22 Statutes, 162, chapter 290), cutting down the Federal jurisdiction in cases where national banks are parties, it was provided as follows:

"That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as and not other than the jurisdiction for suits by or against banks not organized under any law of the United States, which do, or might do, banking business where such national banking associations may be doing business when such suits may be begun."

In Leather Manufacturers' Bank *v.* Cooper, 120 U. S., 779, it was held by the Supreme Court that the act of 1882 prohibited the acquiring of Federal jurisdiction by removal, as well as by original suit. See also Petri *v.* Commercial National Bank, 142 U. S., 644.

Section 4 of the act of March 3, 1887, re-enacted August 13, 1888 (25 Statutes, 433; chapter 866), provides:

"All national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal or mixed, and all suits in equity, be
91 deemed citizens of the States in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between the individual citizens of the same State. The provisions

of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank."

The effect of the act of 1882 was to place national banks, for the purpose of the jurisdiction of the courts of the United States, upon the same footing as other banking institutions in the State wherein they are located, and to prevent the removal of cases to the Federal courts by national banks because of their organization as Federal corporations. National banks now have the same right to bring suit in the Federal court that any citizen has, and the jurisdiction of the Federal court is not enlarged in their favor, or right of removal granted to them in actions against them. It is conceded that the bank had no right to removal in this case. There is no diversity of citizenship or other grounds upon which removal could have been had by it. Had the receiver a better right of removal? In the case of The Bank of Bethel *v.* Bank of Pahquioque, 14 Wall., 384, it was held that a suit could be maintained by the creditor of a national bank in a State court, and that it might be prosecuted, after the failure of the bank, without making the receiver a party. In this case it is held that a creditor of a national bank may resort to a State court for an adjudication of his claim, and such adjudication is conclusive upon the receiver. In Denton *v.* Baker, 79 Fed., 189, it was held that while the receiver of an insolvent national bank may interpose in a suit to enforce a claim against the bank, he is not necessarily a party to the suit; that a judgment in such suit, to which he is not a party is binding upon the receiver in the absence of fraud or collusion. In National Bank of Commonwealth *v.* Mechanics' National Bank, 94 U. S., 437–440, it was held that claims against an insolvent bank, whose validity are established by a judgment in a court of competent jurisdiction, and claims that are proven to the satisfaction of the comptroller, stand upon the same footing. In that case a suit against the insolvent bank was sustained, although the receiver was not a party thereto. In National Bank *v.* Colby, 21 Wall., 609, it was held in a suit against a national bank where its property had been attached at the suit of an individual creditor that the receiver might intervene in order to discharge the attach-
92 ment. In that case the corporation had been dissolved by decree of the district court of the United States, and it was held that, in view of that fact, the suit against the bank had abated.

We have, therefore, reached the conclusion in the light of these authorities and the construction of the statutes applicable to this case by the Supreme Court of the United States, that the receiver, after his appointment, was a proper party to the action, and, being vested with the property of the bank and required to look after its interests with a view to the conservation and distribution of its assets, was properly admitted by the State court to defend the action brought against it. While this is true, he was in no sense a necessary party, and the action could have been prosecuted without his

presence, and the judgment rendered in the action would have been conclusive against him as well as the bank. The question upon which the case turns in our view is: Can a receiver, under the circumstances of this case, not being a necessary party to the action, but having been admitted to defend in the interest of his trust, remove the cause to the Federal court? In view of the decisions of the Supreme Court in analogous cases we are constrained to hold that he cannot. We have not been cited to any cases exactly in point in the Supreme Court, but find adjudications establishing the proposition that one who comes voluntarily into an action is subject to the disabilities of the parties already in the case as to the right of removal. In Cable *v.* Ellis, 110 U. S., 389, it was held in a suit in equity involving title to real estate and priority of liens pending in a State court, where the highest court of the State had decided some of the points in controversy and had remanded the case to the court below to have other issues determined, and where one who became interested in the property by grant from one of the parties to the suit had intervened to protect his rights at a time when the right of removal had expired as to all parties, that the intervention of such party was to be regarded as incidental to the original suit and that he was subject to the disabilities resting on the party from whom he took title; and that the right of removal having expired before he intervened, his right of removal was also barred. In Houston & Texas Central Railway Co. *et al. v.* Shirley, III U. S., 358, Cable *v.* Ellis, *supra*, was approved, and the court, speaking through Mr. Chief Justice Waite, said: "A substituted party comes into a suit subject to all the disabilities of him whose place he takes, so far as the right of removal is concerned."

93 See also, Jefferson, trustee, *v.* Driver, administrator, *et al.*, 117 U. S., 272. It is urged in the argument by counsel for appellees that these are cases where a person voluntarily comes into the suit after the right of removal has expired, and being substituted in the case, has no higher right than the original party to the suit. It is said that receivers of national banks have higher rights to stand upon than the bank itself. This may be true in some instances, yet in the present case we are not advised of any defence to the claim in question which the bank could not have made as well as the receiver. The receiver succeeds to the interest of the bank and his right to defend against this claim is no broader than that of the bank itself.

It is also true that, under the statutes of the United States as they now stand, the bank never had any right to the removal of the cause, and, therefore, the case is not precisely analogous to those cited, in which the Supreme Court has held that the right of removal having expired in favor of the original party, the substituted party comes into the case subject to the disabilities of him whose place he takes. But the receiver comes into an action duly prosecuted in the court of the State with all the necessary parties to a final and conclusive judgment. His presence is voluntary and not essential to a determination of the controversy. The conclusion that we reach is that the receiver, not coming into the cause as a

necessary party, although properly admitted for the purpose of controlling the defence, the case involving property in which he was largely interested as a trustee, had no right of removal. The Federal statutes, giving a receiver the right to remove, apply to cases where the receiver is a necessary party to the action, whether the suit is commenced against him originally or otherwise. This decision is in harmony with a case admittedly in all respects like the one under consideration, decided in the circuit court of appeals for the eighth circuit, Wichita National Bank *v.* Smith, 72 Fed., 568. The judgment of the circuit court is reversed, and the cause remanded with directions to remand the same to the State court from whence it was removed, the receiver, out of the funds in his hands, to pay the costs in the circuit court and in this court.

94 And afterwards, to wit, on January 9th, 1900, a petition for appeal and assignments of error were filed, which are in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

A. J. SPECKERT, &c., Appellants,
vs.
GERMAN NATIONAL BANK, &c., Appellees.

Petition for an Appeal from the United States Circuit Court of Appeals to the Supreme Court of the United States.

Your petitioners, The German National Bank, R. H. Courtney receiver of the German national bank; Adolph Reutlinger, and Albert Reutlinger, would respectfully pray an appeal from the judgment entered in this court on the 4th day of December, 1899, to the Supreme Court of the United States.

They respectfully assign the following errors in the judgment of this court:

1. The court erred in reversing the judgment of the United States circuit court for the district of Kentucky.

2. The court erred in holding that the circuit court should have remanded this cause to the State court.

3. The court erred in holding that the circuit court did not by the removal obtain full and complete jurisdiction of this cause.

4. The court erred in failing to hold that the action of the circuit court in sustaining the demurrer to the bill and dismissing the cause was correct.

95 Wherefore your petitioners pray an appeal as aforesaid.

J. G. CARLISLE,
ALEX. P. HUMPHREY,
GEO. M. DAVIE,
W. M. SMITH,
For Appellees.

And on the same day, to wit, on January 9th, 1900, an order allowing appeal was entered in said cause, which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

A. J. SPECKERT ET AL.
v.
GERMAN NATIONAL BANK.

The appellees having filed a petition for the allowance of an appeal from the decree of this court to the Supreme Court of the United States, together with assignments of error, said appeal is hereby allowed and the bond is fixed at five hundred dollars ($500.00).

And afterwards, to wit, on January 17th, 1900, a bond for appeal was filed, which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

A. J. SPECKERT, &c., Appellants,
vs.
GERMAN NATIONAL BANK, &c., Appellees. } Bond.

96 Know all men by these presents that we, The German National Bank, R. H. Courtney, receiver of the German national bank; Adolph Reutlinger, and Albert Reutlinger, as principals, and Fidelity & Deposit Co. of Md., as surety, are held and firmly bound unto A. J. Speckert, Jacob Frankel, Harriett Frankel, Lewis R. McCleery, W. E. Glover, W. L. Lyons, Aaron Kohn, John Unz, Philip Ackerman, F. J. Renz, Andrew Krebs, D. W. Sanders, receiver of the R. B. Cotter Lumber Company; Charles Buddhu and Senn & Ackerman Brewing Company in the full sum of five hundred dollars, to be paid to them, for which we hereby bind ourselves and executors firmly by these presents.

The condition of the above obligation is such that whereas the above-bounden principals have this day prayed and had allowed to them an appeal from the judgment of the United States circuit court of appeals for the sixth circuit, rendered on the 4th day of December, 1899, in the case of A. J. Speckert, &c., appellants, *vs.* German National Bank, &c., appellees:

Now, therefore, the condition of this obligation is such that if the above-named principal obligors shall prosecute said appeal to effect and answer all costs if they fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

ADOLPH REUTLINGER &
ALBERT REUTLINGER.
A. P. HUMPHREY, *Att'y.*
GERMAN NATIONAL BANK,
By R. H. COURTNEY.
R. H. COURTNEY,
Receiver of German National Bank.
FIDELITY & DEPOSIT CO. OF MD.,
By WILLIS S. MULLIN,
Gen. Agt. and Att'y-in-fact.

97 AT CHAMBERS, CINCINNATI, O., *Jan'y* 17, 1900.

United States Circuit Court of Appeals for the Sixth Circuit.

A. J. SPECKERT ET AL.
v.
GERMAN NATIONAL BANK. } 676.

This day came the counsel for the appellees in this case and presented their appeal bond in the sum of $500.00, which is approved.

TAFT, *C. J.*

98 United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit,* } *ss:*

To A. J. Speckert, Jacob Frankel, Harriet Frankel, Lewis R. McCleery, W. E. Glover, W. L. Lyons, Aaron Kohn, John Unz, Philip Ackermann, F. J. Renz, Andrew Krebs, D. W. Sanders, receiver of the R. B. Cotter Lumber Company: Charles Buddhu, & Senn & Ackerman Brewing Company, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court, to be holden at the city of Washington, *in* on the* 10 day of February next, pursuant to an appeal filed in the clerk's office of the circuit court of appeals of the United States for the sixth circuit, wherein German National Bank, R. H. Courtney, receiver; Adolp- Reutlinger, & Albert Reutlinger are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 8 day of January, in the year of our Lord one thousand and nine hundred, and of the Independence of the United States of America the one hundred and —.

WM. H. TAFT,
Circuit Judge & Presiding Judge of U. S. Circuit Court in Above Cause.

99 Service acknowledged and copy rec'd this Jan'y 9, 1900.

JOHN L. DODD,
Of Counsel for A. J. Speckert et al.

[Endorsed:] Filed Jan. 11, 1900. Frank O. Loveland, clerk.

*Not exceeding 30 days from the day of signing.

100 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of the record and the original citation in

the case of A. J. Speckert *et al. vs.* The German National Bank *et al.*, No. 676, October term, 189–, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

Seal United States Circuit Court of Appeals, Sixth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the sixth circuit, at the city of Cincinnati, Ohio, this eighteenth day of January, 1900.

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

Endorsed on cover: File No., 17,622. U. S. C. C. of appeals, 6th circuit. Term No., 508. The German National Bank *et al.*, appellants, *vs.* A. J. Speckert, Jacob Frankel, Harriet Frankel, *et al.* Filed January 29, 1900.

Office Supreme Court U.S.
FILED
MAR 11 1901
JAMES H. McKENNEY,
Clerk.

No. 192.

Brf. of Carlisle & Humphrey for Appellants

Supreme Court of the United States

Filed Mar. 11, 1901.

GERMAN NATIONAL BANK, ET AL., ... *Appellants,*

VERSUS

A. J. SPECKERT, ET AL., ... *Appellees.*

BRIEF FOR R. H. COURTNEY, RECEIVER OF THE GERMAN NATIONAL BANK.

JOHN G. CARLISLE,
WILLIAM M. SMITH,
ALEX. POPE HUMPHREY,
For Appellants.

JOHN P. MORTON & COMPANY, LOUISVILLE, KY.

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SUPREME COURT OF THE UNITED STATES

GERMAN NATIONAL BANK, ET AL., ... *Appellants,*

VERSUS

A. J. SPECKERT, ET AL., ... *Appellees.*

BRIEF FOR R. H. COURTNEY, RECEIVER OF THE GERMAN NATIONAL BANK.

STATEMENT.

April 4, 1894, the appellees, A. J. Speckert and others, filed a suit in the Jefferson Circuit Court against the German National Bank and others. (R., 1.) This suit alleged that the defendants had entered into a conspiracy to induce the plaintiffs to subscribe to stock in the Louisville Deposit Bank, and had made certain false and fraudulent representations in reference thereto; that the Deposit Bank had become utterly insolvent, its assets having been diverted to pay certain debts due by one Moses Schwartz, a co-conspirator, to the German National Bank.

January 14, 1895, the answer of the German National Bank was filed to this suit. (R., 14.) After further responsive pleadings (R., 30–31), a stipulation was filed, December 5, 1896, agreeing that certain proof taken in another case in the same court, pending against the German National Bank, should be read in this case (R., 32).

December 21, 1896, certain co-defendants of the German National Bank in this case filed an answer and made it a cross-petition against the German National Bank and others, praying a judgment. No process seems to have been issued upon this cross-petition (R., 33).

In January, 1897, the German National Bank having stopped payment, the Comptroller of the Currency appointed R. H. Courtney Receiver.

June 28, 1897, Mr. Courtney filed an application in the State Court to be made a party to this suit. The Court entered the order prayed for (R., 39).

Mr. Courtney then filed a petition to remove the cause from the State Court to the Circuit Court of the United States for the District of Kentucky, accompanying it with the proper bond (R., 40).

The State Court entered an order filing the petition and bond and accepting the bond, and to the effect that the Court would proceed no further therein (R., 39).

October 4, 1897, upon the filing of this transcript in the Circuit Court of the United States for the District of Kentucky, the plaintiffs moved to remand the same (R., 1).

February 8, 1898, the Court overruled this motion, filing a written opinion (R., 42). 85 F. R. 16.

February 28, 1898, time was given to the complainant to reform the bill of complaint. Such a reformed bill was filed April 14, 1898 (R., 50).

June 6, 1898, the German National Bank and Courtney, as Receiver of the Bank, filed a demurrer to this reformed bill (R., 58).

October 3, 1898 (misprinted October 31), this demurrer was sustained, the Court delivering a written opinion (R., 59).

October 15, 1898, the plaintiffs having declined to plead further, the bill was dismissed (R., 65).

From this final decree the plaintiffs duly had an appeal allowed to the Circuit Court of Appeals (R., 65). The case was heard in that Court. The mandate of that Court was that the Circuit Court should remand the cause (R., 70), 98 F. R. 152, to the State Court. Thereupon an appeal was taken to this Court, assigning these errors (R., 74).

Assignment of Errors.

1. The Court erred in reversing the judgment of the United States Circuit Court for the District of Kentucky.

2. The Court erred in holding that the Circuit Court should have remanded this cause to the State Court.

3. The Court erred in holding that the Circuit Court did not, by the removal, obtain full and complete jurisdiction of this cause.

4. The Court erred in failing to hold that the action of the Circuit Court in sustaining the demurrer to the bill and dismissing the case was correct.

Two questions are presented: First, should the Circuit Court of the United States have maintained jurisdiction of the cause? Second, should the demurrer to the bill as reformed have been sustained? We will consider these questions in their order:

Jurisdiction of the Court.

From the foregoing statement it will appear that certain persons, alleging the existence of a large claim against a national bank, brought suit to recover the same in the State Court of the residence of the plaintiffs and of the inhabitancy of the bank. Pending this suit, and after issue joined, and some proof taken, the bank having become insolvent, the Comptroller appointed a Receiver. This Receiver interposed, and, having obtained an

order of the State Court making him a party defendant, removed the case to the United States Circuit Court. Was this removal proper?

Under Section 5234 of the Revised Statutes, whenever the Comptroller of the Currency is satisfied that a national banking association is in default, as provided in Section 5226 and Section 5227, it is his duty to appoint a Receiver.

> "Such Receiver, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts; and on a like order, may sell all real and personal property of such association on such terms as the Court may direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the shareholders."

By Section 5236 of the Revised Statutes it is provided:

> "From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such Receiver on all such claims as may have been approved to his satisfaction or adjudicated in a court of competent jurisdiction."

The exact status of the case at bar is this:

This National bank, having failed, and all of its assets having been put into the hands of a Receiver, under the laws of the United States, and this Receiver, finding a suit pending against the bank in the State Court, believed that the claim asserted was not a just one. Proof of the claim was made to the Comptroller and he rejected it. (R., 56.)

Under these circumstances, it is obvious that the bank could not continue to defend this suit. It was without means or credit.

The Receiver, therefore, must undertake the defense; but how undertake it? Was he bound to do so in the name of the bank, remaining in the State Court, or was it competent for him to have himself made a party defendant and remove the cause to the Federal Court? In other words, as the claim must be adjudicated in a court of competent jurisdiction, did the Receiver have the right to insist upon the Federal tribunal as the court of competent jurisdiction to adjudicate this particular claim?

Jurisdiction in Suits by and Against National Banks.

Originally, there was jurisdiction in suits by and against National Banks in the Federal Courts. This was because the statute gave such jurisdiction, and also because National banks, being corporations created by Federal law, every suit by or against them involved a controversy arising under the laws of the United States.

The 59th section of the Act of February 25, 1863, provided that all suits *by* and *against* such associations might be brought in the proper courts of the United States or State. (Kennedy v. Gibson, 8 Wall. 506.)

The Act of June, 1864, printed in Petri v. Commercial Bank, 142 United States, 645, provided that suits, actions and proceedings *against* any association under this act may be had in any Circuit, District, or Territorial Court of the United States held in the district in which such association may be established.

In Kennedy v. Gibson, 8 Wall. 506, this Court notes that the word "by" is here dropped. It holds, however, that the omission was doubtless accidental, and that suits might be brought *by* or *against* the association in the courts of the United States.

So in the Revised Statutes, Section 563, it was provided that the Circuit Court should have original jurisdiction of all suits by or against any banking association established in the district for which the court is held, under any law providing for National banking associations.

Congress, however, determined to cut down this jurisdiction, and by the Act of July 12, 1882 (20 Statutes, 162; Chapter 290), it was provided as follows:

> "That the jurisdiction for suits hereafter brought by or against any association established under any law providing for National banking associations, except suits between them and the United States, or its officers and agents, shall be the same as and not other than the jurisdiction for suits by or against banks not organized under any law of the United States, which do, or might do, banking business where such National banking associations may be doing business when such suits may be begun."

The following was inserted as Section 4 in the Act of March 3, 1887, re-enacted August 13, 1888 (25 Statutes, 433; Chapter 866):

> "All National banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases the Circuit and District Courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State."

In Leather Manufacturers' Bank v. Cooper, 120 U. S. 779, this Court had occasion to consider the above Act of 1882, limiting the jurisdiction of suits by and against National banks, as to the Federal Courts, and there held that it was the purpose of that statute to prohibit the assertion of such jurisdiction by removal as well as by original cognizance.

In Whitemore v. Amoskeag Bank, 134 U. S. 528, it was decided that, under the Act of 1882, a bill could not be filed against a National bank in a Federal Court where there was no diversity of citizenship between the complainants and the defendants, and the bank was located in the State of which all the other parties were citizens. In other words, the case is a simple application of the Act of 1882.

In Petri v. Commercial National Bank, 142 U. S. 644, this Court discusses, by the Chief Justice, the various statutes on the subject of the jurisdiction of the Federal Court in suits by and against National banks, including the limiting Acts of 1882 and 1888. The Court held that the jurisdiction of the Circuit Courts of the United States over suits by and against National banks was originally derived, first, from the express provisions of the statutes giving such jurisdiction; second, from the principle of law, well settled, that as a National bank was a corporation created by Congress, every suit by and against it necessarily involved a controversy arising under the laws of the United States. This express statutory jurisdiction had been taken away and the jurisdiction had thereby been also taken away, so far as it arose simply from the fact that the National bank, being a Federal organization, necessarily constituted every suit by or against it a Federal controversy. The Court held, however, that a National bank had the same right to bring a suit in the Federal Court that any citizen had, and therefore a National bank could invoke the jurisdiction of the Federal Court where there was diversity of citizenship or where there was a controversy arising under the Constitution and laws of the United States; we mean one other than the controversy which necessarily arose from the fact that the corporation was one of Federal creation.

The point absolutely decided, however, was that the National bank, being a resident of one State, could bring a suit against a citizen of another State.

In Ex-parte Jones, 164 U. S. 692, these authorities were reviewed and the statutes again considered, and it was held that as the suit was by a citizen of Pennsylvania against a defendant (a National bank) having its place at Boston, the jurisdiction of the Court was on account of diverse citizenship, and that there could be no appeal from a Circuit Court of Appeals to this Court, upon the ground that a Federal question was involved, merely because the bank was a Federal corporation.

These authorities show the status of the law as to Federal jurisdiction of actions by and against National banks at this time.

The Circuit Court for the Sixth Circuit, composed of Mr. Justice Harlan and Circuit Judges Taft and Lurton, has recently entertained suits by National banks located in Kentucky against a municipal corporation of Kentucky, where the complainants alleged that they had contracts for a commutation of taxation, which the State was endeavoring to impair, and where it was alleged that a taxing law was in violation of the Federal Banking Act. First National Bank v. Stone, 88 Fed. Rep. 409; Third National Bank v. Stone, 88 Fed. Rep. 990. These cases came here and were reversed on the merits, no question being made by the Court as to jurisdiction. 174 U. S. 438.

Jurisdiction by and Against Receivers of National Banks.

Having said so much in reference to suits by and against National banks, it remains to consider the jurisdiction in suits by and against Receivers of National banks.

In Kennedy v. Gibson, 8 Wall. 503, a Receiver of a National bank filed a bill in equity in a Federal Court, to enforce the double liability of the stockholders. The jurisdiction of the case was challenged because there was no sufficient diversity of citizenship. The Court held that the Receiver represented both the creditors and the association; that he was the proper party to institute all suits; that they might be brought both at law and in equity in his name, or in the name of the association for his use, and that when he sued in his own name it was not necessary to make either creditors or the association parties.

Adverting to the 59th section of the Act of February 25, 1863, providing that all suits and proceedings arising out of the provisions of this act, in which the United States or its officers or agents shall be parties, shall be conducted by the District Attorneys of the several districts, under the direction and supervision of the Solicitor of the Treasury, the Court held that, considering this section in connection with the succeeding section, the implication was clear that the Receivers might sue in the Courts of the United States by virtue of the act, without reference to the locality of their personal citizenship.

This being true as to a suit by the Receiver, the same reasons would sustain the jurisdiction in suits against the Receiver.

In the case of Bank of Bethel v. Pahquioque Bank, 14 Wall. 384, this Court had under review the decision of the Supreme Court of Connecticut. The Bethel Bank failed. The other bank brought suit against it in the State Court of Connecticut, upon a claim that had been rejected by the Comptroller. There was judgment for the Bethel Bank. This was affirmed by the Supreme Court of Connecticut and then by this Court of the United States.

The case is interesting as showing that such a suit could be brought by the creditor in the State Court, and, notwithstanding

the bank had failed, it might be so brought against the failed bank without making the Receiver a party.

In Denton v. Baker, 79 Fed. Rep. 193, attention is called to the fact that, while the Receiver was not a party to the suit, the report of the case in the Supreme Court of Connecticut shows that the suit was there defended by the Receiver, by direction of the Comptroller of the Currency, in the name of the defendant to the suit, for the benefit of the stockholders and creditors of the bank. (36 Conn. 325.)

In Bank v. Kennedy, 17 Wall. 19, a Receiver of a National bank brought suit in the District of Columbia against a debtor of the bank. The Court said that a question had been made in the cause as to the right of the Receiver to bring suit without the authority of the Comptroller, and also it had been insisted that the action could not be maintained by the Receiver in his own name as such. After citing the Fiftieth Section of the National Bank Act, 13 Statutes at Large, 114, the Court said:

> "We have already decided in the case of this same Receiver that he may bring suit in his own name or use the name of the association. This disposes of the question as to the legal right of the Receiver to sue."

The Court further held that he might sue without any express instruction from the Comptroller.

In National Bank v. Colby, 21 Wall. 609, suit had been brought in a State Court in Alabama against a National bank. Attachment had been sued out and levied upon its property. Pending this suit, a Receiver was appointed. About two years after the suit had been brought the Receiver intervened (*vide* page 611). The State Court decided against the Receiver, and, this judgment having been affirmed by the Supreme Court of Alabama, the Receiver took a writ of error to the Supreme

Court of the United States. Among other things the Court said:

> "It is too late for counsel to question in this court the right of the Receiver to appear in a State court and move the discharge of the attachment and the abatement of the suit, or to contest the case at the trial. Whatever informality may have existed in the proceedings, it was waived by the silence of the parties. Objections in matters of form or to the modes of procedure in the court below can not be urged here for the first time. But, independently of this consideration, we are of opinion that it was a proper proceeding on the part of the Receiver to apply to the court below to discharge the attachment, on proof of the facts presented by him, and the production of his appointment, and the decree dissolving the association. Invested with the rights of the bank to the possession of the property by his appointment, it was his duty to take the necessary steps to remove the levy. That levy was void as against his claim to the property, and, in our judgment, it was error in the Court to refuse to discharge it on his application."

It is true that the Court also puts its decision upon another ground, viz., that there had been a decree absolutely dissolving the bank; that this had abated the case so far as the bank was concerned; and therefore the Receiver was the only person who could defend. (*Vide* pages 614, 615.) Nevertheless, the Court did here lay down, as an independent proposition, that it was the right and duty of the Receiver to intervene, in order to protect the assets.

In Bank of Bethel v. Pahquioque Bank, 14 Wallace, 384, the Court had said:

> "Suits and proceedings under the act, in which the United States or other officers or agents are parties, whether commenced before or after the appointment of a Receiver, are to be conducted by the District Attorney, under the direction of the Solicitor of the Treasury, and no doubt is entertained that the directors, from the time the Receiver is appointed, cease to have any power in respect to such matters, and that the control and supervision of the same are vested in the proper officers of the United States."

We quote this expression because it was in a case where the bank had not been dissolved.

In National Bank of the Commonwealth v. Mechanics' National Bank, 94 U. S. 437, it appeared that the Commonwealth Bank, being in default, the Comptroller of the Currency had appointed a Receiver. The principal of the debts of the bank was paid. The Mechanics' Bank brought suit against the Commonwealth Bank, in the Circuit Court of the United States for the Southern District of New York, for the interest upon these demands. The Court held the suit well brought. No question seems to have been made as to proper parties, although it does not appear that the Receiver was a party.

In Case v. Bank, 100 U. S. 446, the Citizens' Bank of Louisiana brought suit in the Circuit Court of the United States for the District of Louisiana, against Case, Receiver of the Crescent City National Bank, claiming a judgment on account of a certain liability of the Crescent City National Bank. As we read the case, the Receiver was the only party defendant. Judgment was rendered directing the Receiver to pay the claim or to certify it to the Comptroller, and this was affirmed.

In Denton v. Baker, 79 Fed. Rep. 193, this case is adverted to as showing that the suit could be maintained against the Receiver alone.

In the case of In re Checkwood, 165 U. S. 457, the Chief Justice, in delivering the opinion of the Court, uses this language:

> "As neither the bank's officers nor directors, nor the Receiver, nor the Comptroller, would, on demand, bring suit, Checkwood's suit on behalf of himself and other stockholders of the California National Bank of San Francisco, to recover judgment in the bank's favor for the alleged wrongful acts of the managing agents of the cor-

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poration, must be assumed, on this record, to have been properly instituted; and it is not contended that this was ever challenged by the Receiver or by Statler, claiming as his successor. The Receiver was made a party defendant thereto, but took no steps to remove the cause to the Federal Court, and, as is averred, assumed an attitude of hostility to the prosecution of the suits, and did nothing to aid in seeking judgment against the officers of the bank, whose alleged breach of trust, and liability therefor, was the sole foundation for the action. Nor is it questioned that the suit was rightly brought in the State Court. (Whittemore v. Amoskeag National Bank, 134 U. S. 527.) The Receiver was appointed by the Comptroller of the Currency January 14, 1889, and Checkwood commenced his suit July 19, 1890. The Receiver was not the officer of any court but the agent and officer of the United States, as ruled by Mr. Justice Gray on circuit, in Price v. Abbott, 17 Fed. Rep. 506, and by Mr. Justice Jackson, then Circuit Judge, in Armstrong v. Troutman, 36 Fed. Rep. 275."

We have given these extracts as recognizing two propositions: One, that the Receiver would have been entitled to remove the case from the State Court to the Federal Court; the other, that the Receiver is an agent and officer of the United States.

In Gibson v. Peters, 150 U. S. 344, this Court had under consideration the right of the District Attorney to receive fees on account of litigation in favor of the Receiver of a National bank. Section 380 of the Revised Statutes of the United States provides that all suits and proceedings arising out of the provisions of law governing National banking associations, in which the United States or any of its officers or agents are parties, shall be conducted by the District Attorneys of the several districts, under the direction and supervision of the Solicitor of the Treasury.

The court said (Mr. Justice Harlan delivering the opinion):

"The suit brought against McDonald (which was a suit brought by the Receiver of the failed bank) was one arising

> out of the provisions of the Act of Congress governing such associations, and the Receiver, in whose name it was instituted, was an officer and agent of the United States, within the meaning of the above section."

In Sonnentheil v. Moerlein Brewing Co., 172 U. S. 504, a suit was brought by a citizen of the State of Texas against a citizen of the State of Ohio and the marshal of the United States for the Eastern District of Texas. The case resulted in a judgment for the defendants in the Circuit Court of the United States for the Eastern District of Texas, and this judgment was affirmed by the Circuit Court of Appeals for that circuit. From this latter judgment a writ of error was prosecuted to this court, and a motion was made to dismiss. This court held that the suit against the marshal for trespass committed by him in his official character was one arising under the Constitution and laws of the United States, and said:

> "The joinder of another defendant, jurisdiction over whom was dependent upon diversity of citizenship, deprived the marshal of no right he otherwise would have possessed. Though there are two defendants the case was one, and that a case in which the jurisdiction was not dependent entirely upon the opposite parties to the suits being citizens of different States."

It was therefore held that this Court had jurisdiction.

Again, in Auten v. United States National Bank, 174 U. S. 126–140, it appeared that a suit was brought by a New York National Bank against an Arkansas National Bank, and the Receiver of the latter bank. The question was as to whether that case could come here on writ of error to the Circuit Court of Appeals. The Court said:

> "To sustain the motion to dismiss it is contended that the jurisdiction of the case depends on diversity of citizenship, and hence that the judgment of the Circuit Court of

Appeals is final. But one of the defendants (plaintiff in error) though a citizen of a different State from the plaintiff in the action (defendant in error), is also a receiver of a national bank, appointed by the Comptroller of the Currency, and is an officer of the United States, and an action against him is one arising under the laws of the United States.

"It is therefore held that the motion to dismiss the writ of error be overruled."

Thus far, the decisions of the Supreme Court of the United States. We shall now call attention to the decisions in the Federal Reporter.

In Price v. Abbott, 17 Fed. Rep. 506, decided June 22, 1883, it appeared that the plaintiff, a citizen of New Jersey, was the Receiver of the Pacific National Bank of Boston, and had brought suit against sundry citizens of Massachusetts, stockholders in the bank, to recover the assessment due by them, made necessary to pay the debts of the bank. The amount of the assessment sued for in one action was $2,000; in another, $300. The Court held that the Receiver was an agent and officer of the United States; that under Clause 3, Section 629, the Circuit Court of the United States had jurisdiction "of all suits at common law where the United States or any officer thereof, suing under authority of any acts of Congress, are plaintiffs," and therefore the plaintiff in this case could maintain the action.

The Court further held that the limiting act of July 12, 1882, Chapter 290, Section 4, taking away jurisdiction in the case of National banks, did not affect this suit.

In Hendee, Receiver, v. C. & P. R. R. Co., 26 Fed. Rep. 677, decided in 1886, it was held that a Receiver of an insolvent National bank could bring suit in the United States Circuit Court to enjoin the defendant, a citizen of the same State (as we read it) as the plaintiff was, from disposing of certain assets

which the Receiver claimed to belong to his trust. The Court said:

> "It is argued that the Receiver has no greater rights than the bank, and merely represents it, and that therefore the jurisdiction is the same, and not other than it would have been if the bank, while doing business, had brought suit. . . . The purpose of that act (1882) appears to be to put National banks, as such, in the same situation as State banks for the purpose of suing and being sued. No State bank or other bank, not a National bank, could be in the same situation in which this bank is. It is wholly in the hands of the orator, as a Receiver, for the purpose of having its affairs wound up, and is not doing any business whatever anywhere. It was brought into this condition by proceedings under the laws of the United States. The orator was appointed to his position as Receiver by an officer of the United States, and is himself an officer of the United States, and acts as such in bringing this suit."

Again the Court said:

> "A suit in behalf of a corporation created by act of Congress arises under the laws of the United States, although the cause of action itself is founded on the common law or other statutes. . . . The right of the orator to sue arises in the same manner. He can not proceed at all without invoking the aid of the laws of the United States. The Act of 1882 appears to take away the right of the bank as such, but not to affect the right of the orator as Receiver. He is the Receiver to collect the assets and pay over the money raised from them to the Treasurer of the United States, and subject to the order of the Comptroller, for distribution among the creditors. . . . The receivership is an entire thing, provided for, controlled and regulated by the laws of the United States, through the Comptroller and the Courts of the United States within the district."

In Armstrong v. Ettlesohn, 36 Fed. Rep. 209, decided in 1888, there was an action by Armstrong, Receiver of a National bank, against the defendant. The Court held that, even though the amount in controversy was less than $2,000, the Court

would have jurisdiction under Clause 3 of Section 629, which we have quoted above; that the plaintiff had received his appointment under the National Banking Laws from the Comptroller of the Currency, and was acting under such authority; so that, being an officer of the United States, he had a right to sue, without regard to his citizenship or the amount involved.

In Armstrong v. Troutman, 36 Fed. Rep. 275, a Receiver brought an action against certain debtors of the bank. Objection was made to the jurisdiction, upon the ground that the plaintiff was a citizen of the same State with the defendants, and that the amount claimed was insufficient to confer jurisdiction under the Act of March 3, 1887. The Court said that prior to the Act of March 3, 1887, this was not an open question, as, under the Act of March 3, 1875, Receivers of National banks, being officers of the United States, could maintain such actions without regard to citizenship of the parties or the amount involved in the suit. The Court—Judge (afterwards Mr. Justice) Jackson, delivering the opinion—said:

> "While by the fourth section of the Act of March 3, 1887, National banking associations are, for the purpose of all actions by or against them, real, personal or mixed, and in all suits in equity, to be deemed citizens of the States in which they are respectively located; and while the jurisdiction of the Federal Courts in suits by and against these associations is only such as they would have in cases between individual citizens, it is, however, expressly provided 'that the provisions of this section shall not be held to affect the jurisdiction of the Courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank.' It seems clear that, under this provision, the jurisdiction of this Court is preserved in cases like the present, where the Receiver is engaged in winding up the affairs of a National banking association and invokes the aid of this Court in collecting the assets of the bank."

The Court thus construes the language "winding up the affairs of the bank," as any necessary process of such winding up; and it would seem to be hardly debatable that the contesting of an unjust claim is as much an incident to the winding up of the affairs of the bank as the getting in of an amount due the estate.

In McConnville v. Gilmour, 36 Fed. Rep. 277, Judge Hammond held, that an agent of the bank was within the spirit of the decision we have just quoted. The opinion is an excellent one, as showing the purpose of Congress where a bank has become insolvent, to see that its affairs are properly wound up for the benefit of everybody: First, the United States; second, its creditors; third, its stockholders.

In Stevens v. Bernays, 41 Fed. Rep. 401, decided in 1890, a Receiver of a failed bank brought suit to enforce a liability on thirty-five shares of stock. The Court held, that the jurisdiction of the Court had not been affected either by the Act of 1882 or the Act of 1888, because a Receiver appointed by the Comptroller of the Currency to wind up the affairs of an insolvent National bank is an officer of the United States.

This case is again reported on appeal under the same style, 44 Fed. Rep. 643, decided in 1890.

The Court was composed of Miller, Justice, and Caldwell, Judge. The Court (in speaking of the jurisdiction of the Federal Court as affected by the Act of 1888, and first quoting the proviso in that act) said:

> "The provision of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States, or by the direction of any officer thereof, or cases for winding up the affairs of any such bank. Now, this case falls within the provisions of that proviso in two or three respects. In the first place, it is a case for winding up the affairs of the bank. It is a suit directed by an officer of the United States and prosecuted by an officer of the United States. The Comptroller

is an officer of the United States. He appointed the Receiver, who is also an officer of the United States, and directed him to bring this suit."

In Grant v. Spokane National Bank, 47 Fed. Rep. 673, decided in 1891, there was a motion to remand a suit which had been brought against the Receiver of a National Bank in a State Court, and by him removed to the Circuit Court of the United States. The Court refused to remand, and said:

> "I hold that the bank is only a nominal party. The Receiver must defend, as he is the one who will be held accountable for any unlawful or unauthorized application or disposition of the money which the plaintiff is endeavoring to secure, and his defense must rest upon a just interpretation of the laws of the United States; for as he holds his office under National authority his conduct must be regulated by the National laws. From the premises, and upon principles supported by the highest authority, the conclusion necessarily follows that the suit is one of which a Circuit Court of the United States is invested with jurisdiction by the clause of the act giving jurisdiction of suits of a civil nature arising under the laws of the United States."

In Fisher v. Yoder, 53 Fed. Rep. 565, decided in 1892, it is simply held that the Receiver of a National bank is an officer of the United States, and, as such, entitled to bring suit to collect its assets in the Federal Court. This is again held in Short v. Hebbin, 75 Fed. Rep. 113.

In Hot Springs v. First National Bank, 61 Fed. Rep. 417, there was a suit by the Hot Springs School District against the First National Bank of Hot Springs and Alvin Fox, Receiver of said bank, in the State Court. It was removed to the Federal Court, upon the ground that it was a suit arising under the Constitution and laws of the United States. The Court refused to remand it, saying:

> "Whatever funds or property this Receiver has, he has received from this insolvent bank, and he holds them by

> virtue of the laws of the United States relative to the appointment and action of Receivers of such banks. His defense to this suit and to every suit brought against him as Receiver is based upon these laws of the United States, under which he holds his appointment, and in accordance with which he must discharge the trust devolved upon him."

In Linn County National Bank v. Crawford, 69 Fed. Rep. 532, Judge Bellinger, after reciting the provisions of the Act of March 3, 1887, said:

> "I am of opinion that it is immaterial whether the action is brought by the Receiver, in his own name as Receiver, or by him in the name of the bank. The thing material to the jurisdiction is the fact that the whole property of the bank has been vested, by direction of law, in the Receiver, and the bank's affairs as an insolvent corporation, are in the control of the Comptroller of the United States Treasury, and are being wound up under his direction."

In Hallam v. Tillinghast, 75 Fed. Rep. 849, suit was brought by Hallam against Tillinghast as Receiver of a National bank, and was removed to the Federal Court. The amount involved was $478.75. The Court said:

> "This case is one arising under the laws of the United States, and, if the amount involved were sufficient, it would be removable under the acts defining the jurisdiction of the Circuit Courts, approved March 3, 1875, and March 3, 1887."

The case of Denton v. Baker, 79 Fed. Rep. 192, in the Circuit Court of Appeals for the Ninth Circuit, is a very full discussion of the right of a Receiver, in case suit is brought against the bank or against himself, in regard to a debt alleged to be due by the bank. His right to intervene and be made a party and defend the cause is pointed out with great clearness. The case does not involve the question of how claims are established against insolvent banks, and fully considers that question. It seems to us to show, beyond controversy, that the action of the State Court, in

the case at bar, in admitting the Receiver to defend, was entirely proper.

In Citizens' State Bank of Noblesville v. Hawkins, 71 Fed. 369; Cooper Insurance Company v. Hawkins, 71 Fed. 372, both decided in 1896; the actions were brought in the United States Circuit Courts by Hawkins as Receiver of the Indianapolis National Bank, and all of them were finally decided by Circuit Courts of Appeal. The question of jurisdiction was not raised in either of them by the counsel or by the Court, although in one of them the defendant was a citizen of the same State as the Receiver and the bank he represented. In Merrell v. National Bank of Jacksonville, 75 Fed. 148, decided in 1896, the action was brought *against* the Receiver in the United States Circuit Court by a citizen of the same State as the Receiver and the bank he represented. No question was made as to the jurisdiction.

In Snohomish County v. Puget Sound Bank, 81 Fed. Rep. 518, the Court held that the agent of the bank had the right to remove the case brought against him and the bank into the Federal Court, upon the ground that for all proper purposes the suit was one to wind up the affairs of an insolvent National bank. In Guarantee Co. v. Hannay, 104 F. R. 370, the right of removal by an agent of the failed National bank is fully discussed and sustained, with a reference to all the leading cases.

We do not pretend to have given all the cases upon this interesting subject. We think, however, we have given enough to show that the jurisdiction is sustained either in suits by or against the Receiver, and that the limiting clause in the Acts of 1882 and 1887 in regard to the jurisdiction over National banks does not apply to suits by or against the Receivers of these banks.

It has been noted above that in the case of Leather Manufacturers' Bank v. Cooper, 120 U. S. 779, the Supreme Court, in considering the Act of 1882, limiting the jurisdiction of suits by or against National banks, held that such limitation was to apply to removal as well as to the original institution of the action. It would seem entirely reasonable to apply the converse of this rule, and hold that as Congress had retained the jurisdiction for the purpose of winding up the bank, and where the Receiver or agent is a party, the jurisdiction should apply by the process of removal as well as by original process.

That it does so apply is clear from the provisions of the second section of the Act of 1888, as corrected and amended, which expressly extends the right of removal to all cases "of which the Circuit Courts of the United States are given original jurisdiction by the preceding section." According to numerous decisions of the courts, Receivers of National banks are officers or agents of the United States, and as suits brought by and against them arise under the laws of the United States, the section referred to plainly confers the right of removal in all cases where the amount in controversy is sufficient to give jurisdiction.

The legislation of 1882 and the fourth section of the Act of 1887, afterwards incorporated into the Act of August 13, 1888, have no reference whatever to the jurisdiction of the United State Courts over suits brought by or against Receivers of insolvent National banks. The sole purpose of Congress, as clearly disclosed by the language of the acts, was to deprive the banks while *sui juris* of the right to prosecute actions in the United States Courts by original process, or to remove them from State Courts upon the mere ground that they were Federal corporations, and to place them, in this respect, upon the same footing as State corporations and private

citizens; but, as is shown by many of the decisions heretofore cited, if a Federal question is actually involved in the controversy, a National bank may still sue or be sued in the United States Courts; and may remove the case from the State Courts. The acts relate to the banks alone while doing business, and the jurisdiction of the courts over suits commenced by or against Receivers of insolvent banks after the Government has taken control of their assets, upon the grounds that these officers are the creatures of congressional legislation, and derive all their authority from the laws of the United States, has not been taken away or curtailed to any extent by the legislation referred to.

All such suits arise under the laws of the United States, and it was upon this ground alone that Congress possessed the constitutional authority to enact the statutes which now constitute the fourth clause of Section 553 and the third clause of Section 629 of the Revised Statutes. The courts of the United States have no common-law jurisdiction in either civil or criminal cases. Their jurisdiction is derived wholly from the Constitution and the laws of Congress enacted in pursuance of the Constitution, and it is clear that if suits by or against Receivers of National banks and other officers of the United States, are not suits arising under the laws of the United States, the judicial power of the Federal Government does not embrace them, and Congress had no constitutional authority to pass the statutes under which the courts have exercised unquestioned jurisdiction for more than three-quarters of a century. There is no clause in the Constitution from which it can be inferred that the judicial power extends to suits brought by or against officers of the United States, unless such suits arise under the laws of the United States. The first clause of Section 2, Article 3 of the Constitution, enumerates the classes of cases to which the judicial power

of the United States extends, and Congress possesses no power to extend it beyond the limits thus prescribed. By that clause it is declared that—

> "The judicial power shall extend to all cases, in law or in equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State, claiming lands under grants of different States; and between a State or the citizens thereof, and foreign States, citizens or subjects."

The only language employed here which could, upon any reasonable construction, be held to extend the judicial power to suits by or against officers of the United States, are the words "arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under their authority." And it is quite clear, not only from the character of the suits, but upon authority as well, that they belong to one of the classes of cases thus described.

In Osborne v. Bank of the United States, 9 Wheat. 738, Chief Justice Marshall, in discussing the right of the bank to sue in the Circuit Court, said:

> "The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to make contracts of any description, to transact business of any description, to sue on these contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of the law, but all its actions and all its rights are dependent upon the same law. Can a being thus constituted have a case which does not arise literally as well as substantially under the law?"

Again, he said:

> "The clause giving the bank a right to sue in the Circuit Court of the United States stands on the same principle with the acts authorizing officers of the United States who sue in their own names to sue in the courts of the United States. The Postmaster-General, for example, can not sue under that part of the Constitution which gives jurisdiction to the Federal Courts in consequence of the character of the parties, nor is he authorized to sue by the judiciary act. He comes into the courts of the Union under the authority of an act of Congress, the constitutionality of which can only be sustained by the admission that his suit is a case arising under a law of the United States."

In view, therefore, of the authorities cited and the reasoning of the Courts in support of them, we submit—

(1.) That, under Sections 563 and 629 of the Revised Statutes, the United States District and Circuit Courts have concurrent jurisdiction of all suits at common law instituted by Receivers of insolvent National banks, without regard to the citizenship of the parties or the amount in controversy.

(2.) That under the first section of the Act of March 3, 1887, as amended and corrected, the United States Circuit Courts have jurisdiction, concurrent with the courts of the several States, of all suits of a civil nature, at law or in equity, brought by or against Receivers of failed National banks, without regard to the citizenship of the parties, when the matter in controversy exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

(3.) That when any suit at common law or in equity in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, is brought in a State Court against a Receiver of a failed National bank, the defendant may, at the proper time, remove the same for trial into the United States Circuit Court.

(4.) That the Receiver is not deprived of his right of removal by reason of the fact that there are other defendants who can not remove because as to them there exists no Federal question.

It is, however, objected that the Receiver coming voluntarily into a suit pending against the bank at the date of his appointment, is no more than a substitute for the bank, and as such, comes into the suit subject to all of the disabilities of the bank whose place he takes so far as the right of removal is concerned.

The cases cited to support this proposition do not seem to us to control it.

They are all cases in which the jurisdiction was dependent upon diverse citizenship, and the Courts held that the necessary facts to confer jurisdiction, either original or by removal, must have existed at the time the action was commenced, and must have been taken advantage of at the proper stage of the proceedings. When the jurisdiction has attached by reason of diverse citizenship it can not be lost by the fact that the parties subsequently became citizens of the same State, nor can jurisdiction be acquired, pending the suit, by the removal of one of the parties to a different State, or by the voluntary transfer of the cause of action to a citizen of a different State; but we are not aware of any case in which it has been held that when the cause of action arises under the Constitution or laws of the United States it may not be removed whenever that fact is made to appear by the plaintiff's pleadings, whether it be before or after answer.

In Cable v. Ellis, 110 U. S. 397, the right of removal was denied to a *lis pendens* purchaser. We think it sufficiently appears that the defendant, from whom the purchase was made, might have removed the case, but failed to do so.

In the case of Houston & Texas Railroad v. Sherley, 111 U. S. 358, Sherley, a citizen of Texas, sued a railroad company.

Pending the suit he became a citizen of New York, and filed an amended petition, bringing in other defendants. These other defendants attempted to remove. The Court held that these new defendants came in as mere succes-ors of the railroad company in title, and also that the case could not be removed because the diversity of citizenship had not existed at the commencement of the action.

In Jefferson v. Driver, 117 U. S. 273, the same principle was applied, and it was again held that a *pendente lite* purchaser against whom relief was asked only as an incident to the original controversy, could not remove; that by purchasing *pendente lite* he connected himself with the suit subject to the disabilities of the other parties in respect to removal at the time he came in.

In Thorn Wire Hedge Company v. Fuller, 122 U. S. 540, an action of trespass was brought against a sheriff, and subsequently the persons in whose interest he had levied the execution, which was alleged to be the trespass, intervened and became parties. The Court held that it was a joint cause for action against all of them, and that, as the sheriff could not remove, none of them could remove.

In the case of Jarboe v. Templar, 39 Fed. Rep. 213, it was held that the Court does not lose its jurisdiction because, by a transfer of interest subsequent to the bringing of the suit, it comes to be one where there is no diversity of citizenship.

The case of Burnam v. Bank, 53 Fed. Rep. 163, is explicable on the same ground that Hedge Company v. Fuller, 122 U. S. 535, is decided upon.

The case of Grand Trunk Railway v. Twitchell, 59 Fed. Rep. 728, seems to be another case of the substitution of an administrator.

The case of Old Wagon Works v. Benedict, 67 F. R. 4,

comes squarely within Hedge Company v. Fuller, 122 U. S. 535, and is cited in support of that decision.

We submit that the Receiver can not be considered as a *lis pendens* purchaser. He takes a right higher than the bank. That is, he takes against the bank and can set aside transactions which the bank could not set aside; can dispute claims, for instance, which the bank could not dispute. He holds in a right adverse to that of the directors and stockholders. All of the assets of the bank are taken out of the hands of the directors and stockholders by force of law and are put into his hands, it being his duty to reduce these assets to money and pay the money into the treasury of the United States. A *lis pendens* purchaser is one who voluntarily acquires an interest in a pending litigation, and who need not even be made a party, but comes into the litigation only by matter of grace of the Court.

But quite the contrary is true of such an officer as a Receiver of a National bank. He comes in pursuance of a duty imposed upon him by the laws of the United States, to protect the assets of the bank from unjust demands as well as to preserve them from unjust seizure.

It amounts to nothing to say that, because the bank failed to apply for a removal, therefore it is too late for the Receiver to ask a removal. The bank never had any right to apply for a removal, but surely a Receiver can not be deprived of his right to remove because the bank did not remove, when it had no right to do so. This is punishing the Receiver for a negligence which never existed.

It is again objected, however, that the application of the Receiver was too late, because it was not made at the time when answer was due; but surely it was not to be expected that the Receiver could remove until he was appointed and had become a party to the cause.

In Powers v. C. & O. R'y, 169 United States, 93, this court, affirming a judgment entered by the Circuit Court (Judge Taft sitting, 65 Fed. Rep. 129), held that if the petition for removal was filed at the first moment when it could be granted, this was sufficient, even though the time had passed in which the defendant could have answered.

That was a case where a citizen of Kentucky sued a citizen of Kentucky and a citizen of Virginia, but just before going to trial dismissed his suit as to the citizen of Kentucky. It was accordingly held that the suit being in a condition to be removed when the citizen of Kentucky was dismissed out of it, an application for removal at that time was not too late.

The Court said:

> "Undoubtedly when the case, as stated in the plaintiff's declaration, is a removable one, the defendant should file his petition for removal at or before the time when he is required by the law or practice of the State to make any defense whatever in its courts, but it by no means follows, when the case does not become in its nature a removable one until after the time mentioned in the act has expired, that it can not be removed at all."

Again, the Court said:

> "The reasonable construction of the act of Congress, and the only one which will prevent the right of removal, to which the statute declares the party to be entitled, from being defeated by circumstances wholly beyond his control, is to hold that the incidental provision as to the time must, when necessary to carry out the purposes of the statute, yield to the principal enactment as to the right; and to consider the statute as, in intention and effect, permitting and requiring the defendant to file a petition for removal as soon as the action assumes the shape of a removable case in the Court in which it was brought."

In the case of Mecke v. Valley Town Mineral Company, 89 Fed. 209, the Roessler & Hesslacher Chemical Company was

made a defendant in the plaintiff's original pleading, but no judgment was asked against it. During the first term, and before the time for answering the original complaint had expired, the plaintiff applied for leave to amend, and was allowed thirty days to file the amendment, and defendants were allowed sixty days to answer. When the amendment was filed it prayed for a judgment against the chemical company for a large amount, and that company, before the sixty days expired, applied for a removal to the United States Circuit Court, which was granted. A motion to remand was made on the ground that the application was not in time, but it was overruled.

We think it must now be accepted as a sound rule of practice, under the Removal Act, that the application is in time if it is made as soon as the facts constituting a ground for removal properly appear in the case, even though the time for appearing and answering, as the case previously stood, has expired. Suppose a suit is instituted in a State Court, but it does not appear in the original complaint that it arose under the Constitution or laws of the State; or that a suit is brought in such a court by a citizen of one State against a citizen of another State, but the amount claimed in the original complaint is less than $2,000, and after answers have been filed an amendment is presented by the plaintiff which shows that the case does arise under the Constitution or laws of the United States, or which increases the amount claimed to a sum exceeding $2,000, could the defendant be deprived of the right to remove, upon the ground that he had already answered, and was, therefore, too late? The case of Guarantee Co. v. Hannay, 104 F. R. 370 (C. C. A., Eighth Cir.), seems to be exactly in point. We can see no difference between such cases and the case where a new and proper party is brought into the case after the original parties have answered. If there was no right of removal until his introduction

in the case, and he makes his application within the proper time after he is brought in, we do not see how it can be denied, except in cases where the jurisdiction depends upon diverse citizenship and the new party is a *pendente lite* purchaser, or otherwise succeeds one who could not have removed the case on that ground.

Wherever a national bank has become insolvent and suits are pending against it, the Receiver should, if he believes the claims are unjust, intervene and have himself made a party defendant. As is said in Earle v. Penn Bank, 178 U. S. 455, when the "bank suspended and went into the hands of a Receiver the entire control and administration of its assets were committed to the Receiver and the Comptroller." It belongs to the Court in which the suit is pending to determine, in the first instance, as to whether a Receiver can rightfully intervene and become a party. In the case at bar, the learned judge of the State Court, after argument, held that the Receiver had the right to intervene and become a party. Having thus become a party, it seems to us that no right which he has of removal can be at all affected by the failure of the bank to apply for a removal when, in fact, it had no such right, and that whether it had or not, as the Receiver is rightfully in the cause, he has, dating from the time he comes into it, all the rights which he would have if he had been originally made a party; and that a right can not be said to have expired before it has arisen.

It is objected again that there was here no right of removal, upon the ground that the suit involved a controversy under the laws of the United States, because the complaint did not show on its face that there was such controversy; and many authorities are cited to sustain that proposition. It is sufficient, however, to answer that even if the complaint did not itself disclose a cause of action arising under the Constitution and laws of the United States, under

the principles of Texas Pacific Railway Co. v. Cody, 166 United States, 606, this case would still be removable. It is held there most distinctly that where a suit is against a corporation created under the laws of the United States, even if the complaint allege that the corporation was organized under the laws of a State, and thus no Federal question appear on the face of the complaint, yet, in the application for removal the true status of the corporation can be stated, and in this way it can be shown that there is a Federal question involved.

But in the present case the original petition filed in the State Court clearly showed that there was a Federal question involved, which would have given the right of removal even before the Receiver was made a party, had it not been for the Acts of 1882 and 1887. Every suit brought by or against a corporation created or organized under an Act of Congress arises under the laws of the United States. This proposition is too well settled to require argument; but the effect of the Acts of 1882 and 1887 was to provide that, notwithstanding the cases arose under the laws of the United States, National banks could not sue or be sued in the Federal Courts, and could not remove suits upon that ground alone; that is, upon the sole ground that it was such a corporation. In other words, their effect was to provide that a particular class of corporations could not sue or be sued in the Courts of the United States, or remove causes to those Courts, although the cases arose under the laws of the United States. A discrimination was made against them in this respect, but against nobody else. The Statutes had no other effect, and, consequently, when a Receiver is brought into such a suit his position and his rights are precisely the same as they were before the laws were enacted.

But if the Federal question did not appear at the beginning of the proceedings it was disclosed the moment the Receiver was

made a party, and his right to remove, upon the record as it then stood, could not be denied.

Though no such point is made in the opinion of the Circuit Court of Appeals, it may be urged here that the removal was not proper because only the Receiver applied for it. The answer to this, however, is that only he could apply for it. The bank could not, and, indeed, the bank, after the intervention of the Receiver, became a mere nominal party. No Federal question was involved as to the individual defendants. The case of Mitchell v. Smale, 140 U. S. 406, is exactly in point, as is the case of Southern Pac. Co. v. Townsend, 62 F. R. 161. The case of Chicago Railway Co. v. Martin, 178 U. S. 245, may be cited. But that case itself points out the distinction between itself and Mitchell v. Smale, and does not attempt to overthrow the authority of the former case. A decision which has stood as long as Mitchell v. Smale, and controlled the practice for so many years, will not be overruled at this late day. Indeed, the case of Chicago Railway Co. v. Martin might well have been put on the ground since taken in the case of Gableman v. Peoria R. Co., 179 U. S., that it was not removable in any event.

In the cases cited against us, there is one which is undoubtedly against our contention. It is that of Wichita National Bank v. Smith, decided by the Circuit Court of Appeals for the Eighth Circuit, 1896, 72 Fed. Rep. 568. That was a case brought by Smith against the Wichita National Bank, in a State Court. Pending the suit the bank became insolvent, and one Ewing was appointed Receiver. Ewing applied to the State Court to be made a defendant, and his motion being sustained, he thereupon removed the case into the Circuit Court of the United States. A motion was made in the Circuit Court to remand the case, which was overruled. There being a trial and a judgment in favor of the plaintiff, the Receiver sued out a wit of error. The

Circuit Court of Appeals reversed the judgment and remanded the case. The Court held that the bank could not remove the suit, because it was not a non-resident. Therefore the suit was not removable on the ground of diverse citizenship. It then held that the bank could not remove the case upon the ground that there was a controversy arising under the laws of the United States growing out of the fact that it was a Federal corporation; and this being so, neither could the receiver remove, being a substituted party. We have heretofore criticised the cases holding this.

As for the last ground for remanding the case, that the plaintiff did not show that the suit was one arising under the laws of the United States, as we have heretofore shown, this is not tenable since the decision of Texas Pacific R. R. v. Cody, 166 U. S. 606.

We think, therefore, that the Circuit Judge correctly refused to follow this case, and that he rightly decided that, as the State Court had admitted the Receiver as a co-defendant, it then and there became the right of the Receiver to remove this case to the Circuit Court of the United States.

Argument Upon the Demurrer.

As stated above, the Circuit Court of the United States, having denied the motion to remand, a reformed bill was filed, to which a demurrer was sustained. To determine whether this action of the Court, in sustaining the demurrer, was rightful, the allegations of the reformed bill will have to be carefully examined. Its sufficiency has been argued as if it were a suit brought by a stockholder in the right of the corporation, the corporation possessing such right of action having made a general assignment for the benefit of its creditors, and the assignee refusing, upon application, to bring the suit. Judge Barr makes a careful ex-

amination of the reformed bill, and shows that such is not its character; but, to the contrary, it is a suit by a number of stockholders, each of whom alleges that, by fraudulent representations he was induced to subscribe to stock in the Louisville Deposit Bank, the amount subscribed and paid by each complainant stockholder being stated in the bill, and the claim being made on their part that the money thus paid by them upon their subscription to the stock of the Louisville Deposit Bank had been diverted from that bank into the coffers of the German National Bank, and insisting that the complainants have the right to follow this money and to recover it for themselves.

The opinion of Judge Barr is found R. 59, and it seems to us to be conclusive upon this question. We think, therefore, that the authorities cited, showing that when a corporation makes an assignment for the benefit of its creditors, the stockholders of such a corporation can, upon the refusal of the assignee to prosecute a corporate right of action, themselves prosecute such corporate right of action, are [illegible]mane to the present controversy. The reason for this is that there is no such bill here presented.

We submit that the demurrer should have been sustained upon the following grounds:

1st. That the bill stated no cause of action, legal or equitable.

2d. That if any cause of action was stated, the remedy was at law; and

3d. That the claims sued upon were held by separate and distinct parties, who can not unite in the same action, either at law or in equity.

I.

The German National Bank, even by the most formal corporate action, could not have legally incurred any obligation or liability, by contract or by representations, concerning the mat-

ters set forth in the bill. They were wholly foreign to the objects and purposes for which the association was created, and every one who dealt with it, or accepted representations made by it, or purporting to be made on its behalf, was bound to know that its authority did not extend to such subjects. The National Act (R. S., Sec. 5136) provides that "the Bank may exercise, by its board of directors, or duly authorized officers or agents, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security, and by obtaining, issuing and circulating notes, according to the provisions of this statute."

Getting "control" of the charter for a State bank, or organizing a State bank, or soliciting subscriptions to the capital stock of such a bank, or any other corporation, does not come within the scope of the powers conferred by law upon National banking associations; and they can not, even by the most solemn contracts or the most positive statements or representations, oral or written, bind their stockholders and injure their creditors by attempting to engage in such transactions. They can not deal in lands, or stocks, or shares of other corporations, or even in commercial paper, except in the manner and for the purposes authorized by the statutes; nor can they act as brokers, or promoters, nor enter into any contract or incur any liability concerning business outside the objects of their creation.

National Bank v. Exchange Bank, 92 U. S. 122.
Western National Bank v. Armstrong, 132 U. S. 346.
Danforth v. Bank, 48 Fed. 271.
California Bank v. Kennedy, 167 U. S. 363.
Bank v. Hock, 89 Pa. St. 324.
Weckler v. Bank, 42 Md. 581.
Logan County Bank v. Townsend, 139 U. S. 67.

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An enumeration of the powers of a corporation is equivalent to a prohibition of the exercise of any others.

Pearce v. Mad. & Ind. R. R. Co., 21 How. 442.
Bank of Augusta v. Earle, 13 Pet. 587.
Perrine v. Ches., etc., Canal Co., 9 How. 184.

Acts, declarations, and representations of directors, in order to bind the corporation, must relate to matters within the scope of its authority, and must be performed or made as a board. Individual directors have no implied or general authority to bind the corporation. 1 Elliott on Railroads, 269, and the authorities there cited; also National Bank v. Drake, 35 Kans. 564.

Even where directors or other officers make false statements and reports, in the name of the corporation, concerning the condition of the business in which the corporation is legitimately engaged—for instance, as to its solvency, or the value of its stock, or the nature of its assets—or if they issue fraudulent stock or bonds, they, and not the corporation, are bound. 1 Elliott on Railroads, 3282, and authorities cited.

In Prescott v. Haughey, 65 Fed. 653, which was a suit against all the directors for making false advertisements, statements, and reports as to the condition of the bank in which they were directors, whereby the Typographical Union was induced to deposit $35,000, the Court said:

> "The fraudulent representations charged in the complaint, if made under color of their office, were made entirely outside of the official duties of the directors. Neither the law nor the obligations of their office made it any part of their duty to utter and publish false and fraudulent advertisements, statements, and reports in regard to the condition of the bank. The tort for which they are sued was committed in their private and personal capacity, because the law does not confer upon said officers power to commit

frauds of the character complained of. These directors have used their official stations to enable them to perpetrate a fraud on the plaintiffs entirely outside of the legitimate scope of their duties." Page 655.

In the case quoted from, as in many other cases reported in the books, the representations made by the officers related to matters in which the bank was directly interested. They related to its legitimate business, and were designed to give it credit in order that it might secure deposits and profitably conduct the affairs for which it was organized; and yet, the Courts hold that the officers have no power to bind it, even in such matters, by false and fraudulent statements. In such cases, the bank is, of course, liable for all deposits received and all credits given it on account of the false statements and representations, but its liability is not created by the false statements and representations. It arises from the fact that deposits were actually made with it, or credit actually given it; and this liability would exist if no fraudulent representations had been made. In the present case, the German National Bank did not receive any money from the appellees, or any of them; and, besides, it is not sued on a contract, but for damages on account of alleged fraud and deceit, alleged to have been committed by two of its officers. The money alleged to have been parted with by the complainants was not paid to it, but to the Louisville Deposit Bank, and became its property. If the German National Bank, afterwards, by fraudulent means, in the course of transactions with the Louisville Deposit Bank, procured an equal sum of money, or even that identical money, from it, the right of action to recover it back belongs to the latter bank, and not to the appellees in their individual capacities. The right of the Louisville Deposit Bank, however, to recover—if it has such a right—is not dependent in any degree upon the fraud alleged to have been perpetrated upon them, but

is based entirely upon the fraud alleged to have been subsequently practiced upon the bank itself. The two alleged frauds are entirely distinct, and are shown by the bill to have been perpetrated upon wholly different parties. The German National Bank is, therefore, not liable to these appellees individually for any money it afterwards secured by fraud from the Louisville Deposit Bank, nor is it liable to the Deposit Bank or its creditors, on account of any fraud alleged to have been committed upon the appellees individually.

If the German National Bank is liable to these parties, it is solely on the ground that the President and Assistant Cashier possessed, by virtue of their offices, a general or implied power to bind it by their false statements concerning a business in which it could not be lawfully engaged. It is not alleged that the bank ever took any corporate action whatever in regard to the representations made to the appellees, or in regard to the organization of the Louisville Deposit Bank, or the election of Schwartz as President of that institution, or that it, in any other manner, conferred, or attempted to confer, special authority upon its President or Assistant Cashier to represent it in these matters. The inference that the bank, in its corporate capacity, made any representations or entered into any conspiracy, is expressly negatived by the averments in the bill. It is alleged that—

> "Said German National Bank, through its said President and said Assistant Cashier, . . . colluded, confederated and conspired together with the fraudulent purpose to organize, etc., etc." (Page 3)

And, again, it is alleged that—

> "The said German National Bank, *through* its *officers* and *directors*, especially through its President and Assistant Cashier, aforesaid . . . did falsely and fraudulently represent to your orators, etc., etc." (Page 4.)

No other officials of the bank are mentioned in the bill. Presumably, the bank had a full board of directors and a full complement of other officials, as required by the law and usage, and yet the Court is asked to charge it with damages to the amount of $240,000, on account of false representations, alleged to have been made by only one of its directors and another subordinate officer, neither of whom had been clothed with general or special authority to act in the matter. It is not necessary to cite authorities or make an argument to show that one or two officers, or even all the officers, do not constitute the corporation. They are simply agents of the corporation. As such agents, they possess certain general or implied powers for the purpose of carrying on the business for which the corporation was created, and their acts and declarations, while engaged in carrying on that business, are binding upon it. Each official possesses these general or implied powers only as to that particular part of the business which has been legally entrusted to him; and, if he undertakes to do an act which belongs to the functions of a different officer, he must show express authority for it, or a subsequent ratification of it. If he acts within the scope of his authority, as already said, he binds the corporation; but, if he acts without any authority, or exceeds the authority delegated to him, he binds himself personally, but does not bind the corporation. If he acts within the scope of his authority, and thus binds his principal, he does not ordinarily bind himself personally. Doubtless, if a principal should instruct his agent to make representations which both he and the agent knew to be false, and the agent should do so, both would be liable to the injured party; but the general rule is that when the principal is liable the agent is not, and, when the agent is liable, the principal is not.

See Story on Agency, Section 261, *et seq.*

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The charge in the bill, that the bank combined and confederated with its President and Assistant Cashier and Schwartz to defraud and injure the complainants, adds nothing whatever to the strength of the case, because it plainly appears that whatever was done in the formation of a conspiracy, was done by the two officials named, without authority from the bank, and concerning a matter in which the Bank could not legally bind itself by contract or otherwise. In short, the officials simply combined with each other to do something which the bank had no power to do.

II.

If the appellees have any cause of action against the German National Bank and its Receiver, their remedy is at law. The appellees were sued for a tort, and the judgment must be for damages. Every act which gives a cause of action for damages, and does not constitute a contract, is a tort.

See Pollock on Torts, page 3.
Addison on Torts, Sec. 1, Sub. 38, page 35.
Cooley on Torts, Chapter I.

In Russell v. Clark, 7 Cranch, 89, the Court said:

> "It is a well-settled rule of law that whenever a matter respects personal chattels, and lies merely in damages, the remedy is at law only, and for these reasons: First, because courts of law are as adequate as courts of equity to grant complete and effective reparation to the party injured; second, because the ascertainment of damages is peculiarly the province of a jury."

See Lacombe v. Forstall, 123 U. S. 562; Buzard v. Houston, 119 U. S. 347; Reynes v. Dumont, 130 U. S. 354; Keburn v. Sunderland, 130 U. S. 505; Brown v. Lake Sup. Iron A., 134 U. S. 530; Lewis v. Cochs, 23 Wall. 466; Oelrichs v. Spain, 18 Wall. 211.

There is not a single element in the case presented by the appellees to justify a court in depriving the appellants of the right to have it tried at law before a jury, or, rather, before juries, because, as we shall show hereafter, there are twelve separate and distinct causes of action set forth in the bill, and an attempt to drag in a great many more. There is no trust or lien, or common fund to be distributed, or community of interest in the claims themselves or in the relief sought, or any other fact or circumstance connected with the case as shown by the bill, which according to any recognized rule, would give a court of equity jurisdiction. It was a simple action to recover damages for fraud and deceit, alleged to have been practiced upon the appellants by parties who stood in no fiduciary relation to them, who gave them no lien, either separately or collectively, and who had no transactions with them, except to induce them to part with their money by false representations, as alleged. It is not an action to rescind a contract or to recover property alleged to have been procured by fraud, but the only relief the Court can possibly give upon the allegations of the bill is a judgment *in personam* for the amount of damages which each one may show he has sustained.

Sometimes, when a court of equity has already obtained jurisdiction of a case on other grounds, it will, in order to avoid a multiplicity of suits about the same matters, go on and do complete justice between the parties, even by granting legal relief; and sometimes a court of equity will take jurisdiction of a bill, to protect the complainant against the annoyance and costs of a multiplicity of suits about the same matters; but we know of no case in which a court of equity has taken jurisdiction of a bill by a complainant upon the ground that it was necessary to protect his adversary against a multiplicity of suits for separate injuries inflicted upon different parties by his own wrongful acts.

See Story's Equity, Sec. 64, K.

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Nor is this a case in which a court of equity can take jurisdiction upon the ground that it involves matters of account. Story's Equity, Sec. 457, and the following sections.

There have been no accounts, mutual or otherwise, between the parties. The appellees state in their bill—

> "That, in equity and good conscience, they are entitled to an accounting from the defendant, German National Bank, Adolph Reutlinger and Albert Reutlinger, to the end that they and each of them should be compelled to account and pay over the funds contributed by your orators and their associates, to the extent, at least, of the benefits unlawfully received by them therefrom, etc., etc."

Now, it is perfectly clear from the bill that if the appellants are liable at all, each one of them is liable for the *whole amount* of the loss sustained by each one of the appellees, and no accounting is necessary, or can be had. The foundation of the action is that the appellees were induced, by the fraudulent representations of the appellants, to pay their money to the Louisville Deposit Bank, and it is wholly immaterial, in such a case, whether the parties sought to be charged, or either of them, afterwards, by improper means or otherwise, procured the money, or any part of it, from the bank. If they fraudulently induced the appellees to part with their money, and they lost it, each one of them is personally liable for the whole amount of the loss, although he may have received no benefit whatever from the transaction. This is not an action to recover back money paid to them, but a suit to recover damages on account of the loss of money paid to another party, by reason of their fraudulent conduct. Moreover, the accounting for which the appellees ask is a proceeding which could take place only after a trial and after a personal judgment for damages had been rendered, because until that time, it can not be known that the defendants owe them any thing. Whether a court of equity has jurisdiction

to conduct such a trial and render such a judgment, is the very question in controversy, and, if it has no such jurisdiction, it follows necessarily, that the accounting, which would be a mere incident to the judgment, can not be had.

The appellees allege that the

> "Affairs and accounts between the said defendants . . . have been and are in a complicated condition, and can not be adequately dealt with in a court of law, etc., etc."

It would seem to be sufficient to say, on this point, that the appellees have no interest whatever in the state of the accounts between the defendants, and that they can not make the condition of those accounts the foundation of an equitable jurisdiction over their suit for damages. Neither their right to relief, nor the character or measure of their relief, depends upon the state of the accounts between the defendants.

There can be no contribution among wrongdoers, and consequently, if the money of the appellees had actually been paid to the appellees, instead of being paid to the Louisville Deposit Bank, and one of them had succeeded in appropriating the whole of it to his own use, all the others would have been liable for the whole damage. The attempt, therefore, to sustain the jurisdiction of a court of equity, in such a case, by asking for an accounting between the defendant, must fail for three reasons:

1. Because the Court had no jurisdiction to hear and determine the cause which constitutes the basis of the prayer for an accounting.

2. Because no accounting can be necessary or proper, as each appellee, if liable at all, is liable for the entire damage; and

3. Because the accounting is not asked to be made between the opposing parties to the suit, but between the appellees alone.

Among the cases cited by the appellees in support of the

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jurisdiction of a court of equity to grant relief to a stockholder, who has become such by reason of false representations, that of Peak v. Gurney, 6 House of Lords Reports, 377, is the only one which seems to require notice. The question of jurisdiction was not made in that case, but it was assumed to exist, although the relief prayed for was denied. That case was quite different from the one at bar. There was no attempt to join several stockholders in one suit, for the purpose of recovering either a joint judgment or several judgments; the action was brought by a single stockholder, who had become such by purchase from the original stockholder, who had been fraudulently deceived; the defendants were officers of the corporation which issued the stock, and it was claimed that the plaintiff was entitled to recover upon the false representations made, when it was issued or allotted to his vendor, to induce him to become a stockholder; and, besides, the claim was, as the Court said, "founded upon the loss the appellant has sustained, *and may sustain*, in consequence of being bound by the contract he has entered into." It was not merely a suit for past damages, but for indemnity against future loss. Such relief could not have been secured in an action at law, and it seems to have been conceded that no action at law could have been maintained, even for past damages, by a plaintiff who acquired his stock from another party under the circumstances disclosed in the case. The suit appears to have been brought upon the theory that, as there was no legal remedy against the executor of the deceased officer, or against his associates, there must be some method by which they could be reached in equity; but the courts held that there was no remedy in such a case, either at law or in equity.

III.

But whether the case is cognizable at law or in equity, there was a fatal misjoinder of causes of action and of parties complainant. It is not claimed that the appellees were induced to make a joint subscription to the capital stock of the Louisville Deposit Bank, or that they paid their subscriptions out of a joint or common fund, or that they have a joint or common interest in any judgment or judgments that may be rendered. On the contrary, it is distinctly alleged that they made separate subscriptions, each one subscribing a specific sum, in his own name and on his own behalf, and the amounts of their several subscriptions are set forth in the bill. If a recovery is had, there must be twelve separate judgments *in personam*, one in favor of each appellee for the amount of damage sustained by him, in which no other one will have any interest whatever; and each one can proceed to collect the amount of his own judgment without regard to what course the others may pursue. Speckert can not be plaintiff in an execution to collect the judgment in favor of Frankel, or *vice versa*. One of the judgment creditors may, by superior diligence, succeed in collecting the whole amount due him, to the total exclusion of all the others, and they would have no claim on him for contribution. In fact, it is impossible to imagine a case in which the interests of parties are more completely severed than they are in this. On this branch of the demurrer the authorities are numerous and uniform. It is an elementary rule of pleading, at common law and in equity, and it is recognized in all the statutory codes, that parties can not unite as plaintiffs in actions for torts, or in actions on contracts, unless they have a joint or common interest in the subject-matter. In 1 Southerland on Damages, pages 208, 209, it is said:

> "Whether actions in tort are joint as to the parties injured, or joint as to the parties liable, depends on very

plain principles. The injury is joint when it at once affects property or interests jointly owned; in other words, there must be a community of interests between the parties injured in that which the injury affects."

The rule is also stated in 17 American and English Encyclopedia of Law, pages 600, 601, as follows:

"When their injuries are separate, two or more may not join as plaintiffs in an action of tort, though the injuries are occasioned by the same act."

And again, as to actions on contracts, it is said:

"Parties having rights of action arising out of several contracts with the same obligor, or several rights of action against the same obligor arising out of the same contract, may not join as plaintiffs in one action against the obligor." —17 American and English Encyclopedia of Law, page 561.

The text is supported by the citation of numerous authorities; to which we refer the Court.

Foster says:

"No persons can unite as plaintiffs in a bill in equity unless they have a joint or common interest in obtaining the same relief."—Foster's Federal Practice, Section 72.

And he cites Story's Equity Pleading, Section 279, and Calvert on Parties, 105–110.

Again he says:

"Multifariousness consists in the joinder of two or more distinct and unconnected grounds for equitable relief, each of which might be the foundation for a separate bill. This may occur in three ways—by a misjoinder of plaintiffs, by a misjoinder of defendants, and by a misjoinder of grounds for equitable relief held by and against the same parties."—Section 71.

And see Calvert on Parties, Book 1, Chapter VIII.

It would be tedious to cite all the cases in which the rule as laid down by these writers has been recognized and applied by the Courts, and it is unnecessary to do so, for no case can be found in which the correctness of the rule itself is questioned. It may be useful to the Court, however, to refer to a few of them, which may be conveniently consulted. In Cutting et al. v. Gilbert, 5 Blatch., U. S. C. C., 259, six parties united in a bill in equity to enjoin the collection of a tax which it was alleged was about to be illegally assessed and collected, and in deciding the case the Court said:

> "The interest that will allow parties to join in a bill of complaint, or that will enable the Court to dispense with the presence of all the parties, when numerous, except a determinate number, is not only an interest in the question, but one in common in the subject-matter of the suit. . . . In the case before me, the only matter in common among the plaintiffs, or between them and the defendants, is an interest in the question involved, which alone can not lay a foundation for the joinder of parties."

The bill was dismissed for misjoinder of plaintiffs, and also for the reason that the parties had a remedy at law. In Gray et al. v. Rothschild et al., 48 Hun (55 N. Y.), 596, the suit was brought by seven different firms to recover damages, on the ground that the defendants had entered into a conspiracy to defraud them by purchasing goods on credit and then removing and secreting them without making payment, and that this conspiracy had been carried into execution. The Court examined the whole question and reviewed many authorities, and the result was that the bill was dismissed, on the grounds that there was a misjoinder of plaintiffs and a misjoinder of causes of action.

See Yeaton v. Lenox, 8 Pet. 123.

Gaines v. Chew, 2 How. 619.

Woolstein v. Welch, 42 Fed. 566; and 41 Fed. 249; heretofore cited.

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The rule itself is perfectly plain, and difficulty arises only in its application to the particular circumstances of each case; or, in other words, in determining in each case whether the parties uniting in the action have a joint or common interest in the subject-matter or in the relief sought. It is clearly not sufficient that the parties have a common interest in the legal or equitable questions involved in the litigation. They must have a common interest in the money or property involved, or they must at least have a common right to participate in the fruits of the judgment, according to their respective interests, as in the cases of trusts and liens for the benefit of several parties.

In the present case, it seems to us there can be no difficulty in the application of the rule. A fraud is alleged to have been perpetrated upon these appellees by which each one of them is alleged to have been separately injured—one to the amount of $2,500, another to the amount of $1,000, and others in different amounts stated in the bill. No one of them has, or pretends to have, the slightest interest in the claims of the others, or acknowledges the right of any of the others to an interest in his claim. Upon what ground, then, can they maintain their right to unite in one action, either at law or in equity? It certainly can not be maintained upon the ground that they have, and must continue to have, a common interest in the questions involved, even if that were sufficient; because, although a fraud may have been perpetrated upon one, it does not necessarily follow that a fraud was also perpetrated upon any one or all of the others, and it does certainly appear on the face of the bill that they have no common interest in the subject-matter of the action.

But these appellees sued not only for themselves, but attempted to sue also for all the other subscribers to the capital stock of the Louisville Deposit Bank who were induced

to subscribe by the alleged fraudulent representations; that is, they asked the court try a question of alleged fraud and damages between the appellants and numerous other parties, who are not even named in the bill. The Court was called upon to ascertain whether fraudulent representations were made to parties wholly unknown to it, and whether these unknown parties believed such representations and paid money on account of them, and if so, how much they paid and whether their claims have been transferred, or released or satisfied. The circumstances under which one or more persons may sue on behalf of themselves and others are stated in Foster's Federal Practice, Section 49, and it requires no argument to show that the rule does not extend to such cases as the present. See also Railroad Co. v. Orr, 18 Wall. 471.

The claim made by the appellees on the argument of the demurrer in the Circuit Court that the suit was brought on behalf of the Louisville Deposit Bank, for the benefit of all its stockholders, is inconsistent with the specific allegations and general structure of the pleading. The means by which they were induced to subscribe and pay for the stock are set out with great particularity, the alleged false statements and representations being given in detail; and they expressly state that they sue "for themselves and all others of the same class to which they belong," meaning, of course, the class of subscribers who were induced to become such by the alleged fraudulent conduct of the German National Bank and two of its officers. Throughout the entire pleading it plainly appears that they are claiming a recovery for themselves "and others of the same class with them"; and, after setting forth the alleged fraudulent statements, they say that, "relying on the aforesaid representations, and believing them, and each of them, to be true, (they) were induced thereby to subscribe, and did subscribe and pay, for

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stock in said new bank at par." Thus, their cause of action, as clearly stated by themselves, is based upon the alleged fraudulent representations by which they were induced to become subscribers, and is not a claim against the Louisville Deposit Bank, as stockholders in that institution, but a direct claim for damages against the parties who are alleged to have defrauded each one of them individually. This view of the case is conclusively sustained by an examination of those parts of the bill which relate to the alleged spoliation of the funds of the Louisville Deposit Bank by the German National Bank and its two officers and Schwartz. The allegations upon this subject are clearly insufficient to show a cause of action, either at law or in equity, upon the theory that they are suing on behalf of the Louisville Deposit Bank, or claiming through that bank. They are as follows:

> "Your orators state that, immediately after the organization of the Louisville Deposit Bank, as aforesaid, the said German National Bank and Adolph Reutlinger and Albert Reutlinger and Moses Schwartz commenced, and systematically continued, until the making of the said assignment, to unload upon the Louisville Deposit Bank the worthless papers and claims held by the German National Bank against the said Moses Schwartz; and by the connivance and collusion of the said Moses Schwartz with the said German National Bank and the said Adolph and Albert Reutlinger, and without the knowledge and consent of your orators, *the money raised and contributed by your orators* and their associates, as capital stock aforesaid, was fraudulently diverted, spoliated, and used to pay the worthless claims and debts due by the said Schwartz to the said German National Bank and to said Adolph and Albert Reutlinger.
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> . . . . . .
>
> "Your orators say that the funds *contributed by them* to the capital stock of the Louisville Deposit Bank, in payment of their respective subscriptions as aforesaid, constituted a trust fund which was not liable for any of

the debts or obligations of the said Moses Schwartz to the said German National Bank and to said Adolph and Albert Reutlinger, and was not liable for the subscriptions of the officers of the said German National Bank to the capital stock of the said Louisville Deposit Bank; and, in equity and good conscience, should not and could not have been lawfully used or appropriated by the said German National Bank, Adolph Reutlinger and Albert Reutlinger and Moses Schwartz for any of such purposes.

"Your orators do not know, and can not say with exactness, how much of *their said subscription funds* were so used, spoliated and appropriated by the said German National Bank, Adolph Reutlinger and Albert Reutlinger and Moses Schwartz, but, on information and belief, aver and charge that at least the sum of two hundred thousand dollars of *their said subscriptions* and payments on capital stock were so used and appropriated.

"Yours orators state that, by reason of the fraudulent collusion, conspiracy, combination and machinations, as aforesaid, of the said defendants, German National Bank, Adolph Reutlinger, Albert Reutlinger, and Moses Schwartz, *the funds contributed by them* were spoliated and depleted, and said Louisville Deposit Bank was ruined, and became insolvent, and was compelled to suspend, and on July 25, 1893, made a general assignment of all of its property to the defendant, Germania Safety Vault & Trust Company, for the benefit of its creditors, and that its assets have not paid any thing, and will not pay more than five per cent on the valid claims proven and asserted against it."

These are nothing more than general allegations that the money contributed by the appellees was fraudulently diverted, spoliated, *et cetera*, to pay the worthless paper of Schwartz held by the German National Bank and the Reutlingers. No specific facts are stated upon which issues could be taken. It is not stated how much money was improperly received by the German National Bank, or how much by the two Reutlingers, singly or jointly, or by what means or devices, or on what worthless debts, it was taken from the bank. The epithet "fraudulently," and the words "worthless debts," do not

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constitute a sufficient foundation for a judicial investigation according to any system of pleading recognized by the courts in this country. The facts constituting the fraud, and the facts in regard to the paper, should have been stated, in order that the defendants might have an opportunity to answer them, and that the evidence may be directed to them; and this is especially required in proceedings in equity.

If this is to be treated as a suit to recover in behalf of the Louisville Deposit Bank for money belonging to that corporation and fraudulently procured from it by the appellants, it is clear that all the allegations concerning the means by which the appellees were induced to subscribe are irrelevant; but it is equally clear that if those allegations were stricken out there would not be even the semblance of a cause of action stated in the pleading. All the remaining allegations might be fully answered by a simple denial in general terms that the defendants had fraudulently appropriated any part of the funds of the Louisville Deposit Bank to the payment of worthless debts held by them, or either of them, against Schwartz. We insist, therefore, that according to every rational construction that can be given to the bill, this was a suit by the appellees to recover, each for himself, damages on account of a fraud alleged to have been committed upon them individually, and not a suit to recover for a fraud practiced upon the Louisville Deposit Bank.

We ask that the decree of the Circuit Court of Appeals be reversed, and that of the Circuit Court affirmed in all respects.

JOHN G. CARLISLE,
WILLIAM M. SMITH,
ALEX. POPE HUMPHREY,
For Appellants.

Office Supreme Court U.S.
FILED
MAR 9 1901
JAMES H. McKENNEY,
Clerk

c/c. 192.

Sy. of Dodd, No. [illegible]

For Appellees.

Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed Mar. 9, 1901. 192.

THE GERMAN NATIONAL BANK, ADOLPH REUTLINGER AND ALBERT REUTLINGER, *Appellants*,

v.

A. J. SPECKERT, JACOB FRANKEL, HARRIET FRANKEL, ET AL., - - - - *Appellees.*

BRIEF FOR APPELLEES.

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OF COUNSEL.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

THE GERMAN NATIONAL BANK, ADOLPH REUTLINGER AND ALBERT REUTLINGER, - - - - *Appellants,*

v.

A. J. SPECKERT, JACOB FRANKEL, HARRIET FRANKEL, ET AL., - - - - - - *Appellees.*

BRIEF FOR APPELLEES.

STATEMENT.

This is an appeal from a decree of the Circuit Court of Appeals for the Sixth Circuit, entered December 4, 1899, reversing a decree of the Circuit Court of the United States for the District of Kentucky, with directions to it to remand the case to the state court "from whence it was removed." (Pr. Rec. 70-76.)

The suit was commenced by the appellees April 4, 1894, in the Jefferson Circuit Court of Kentucky against the appellants as defendants. It was a suit in behalf of the creditors and stockholders of the Louisville Deposit Bank, in which it was alleged that the appellants and

one Moses Schwartz had entered into a conspiracy to induce the complainants to subscribe and pay for stock in the Louisville Deposit Bank, and then to misappropriate the proceeds of said stock to the payment of the obligations of the said Moses Schwartz to appellants.

It is alleged that in March, 1891, the said Moses Schwartz was indebted to the appellant, German National Bank, in divers sums aggregating over two hundred thousand dollars, and was hopelessly insolvent, and was also at the same time indebted to the appellants, Adolph and Albert Reutlinger, the president and assistant cashier of the said German National Bank; that the said appellants had discovered the utter insolvency of the said Schwartz and realized that unless they could devise a scheme that would enable them to unload their worthless claims against said Schwartz on others, they would be unable to realize anything on the said claims; that after conference they agreed to acquire and did acquire a state charter for the Louisville Deposit Bank, with an authorized capital stock of three hundred thousand dollars, and then set about to organize and float that bank with Moses Schwartz as its president; that they thereupon issued prospectus and subscription papers, wherein they fraudulently represented that the said Schwartz was worth as much as the authorized capital stock of the said proposed new bank, over and above his indebtedness, and was a very successful and capable business person, suitable in all respects to be the president of the said bank; and they headed the list of subscriptions with large bogus amounts, aggregating at least sixty thousand dollars, not one cent of which was ever in fact paid by them, nor in-

tended at the time to be paid by them, otherwise than by a transfer thereof to the said Moses Schwartz after the completion of the organization of the said Deposit Bank and the inauguration of the said Schwartz as president thereof.

It was further alleged that they then approached the appellees and, by their false and fraudulent representations (as set forth in detail in their complaint), induced the appellees to subscribe and pay for stock in the said bank at its par value. They then commenced and systematically proceeded to unload on the said Louisville Deposit Bank their worthless claims against the said Schwartz, including their bogus subscriptions aforesaid, and within about two years, secured from the said bank, and applied in execution of their fraudulent scheme, every available dollar it possessed. In this wrecked and looted condition the said Louisville Deposit Bank was forced to the wall and compelled to make a general assignment for the benefit of its creditors to a trust company which was managed and controlled by the appellants.

After first having exhausted their efforts to have the assignee bring this suit, the appellees instituted it as stockholders and creditors of the said wrecked bank and sought to make the conspirators in the perpetration of the said fraud trustees *ex maleficio* of the funds of the said Deposit Bank derived from their spoliation of its capital, and to compel them to account for and make restitution thereof.

On January 14, 1895, the appellants filed lengthy separate answers. (Pr. Rec. 14-28).

On May 6, 1895, the appellees filed replies to the said answers, joining issue on each and every affirmative allegation therein contained. (Pr. Rec. 30-31.)

Voluminous proofs were taken and the cause was fully prepared for trial in the state court. (See stipulation Pr. Rec. 64.) The taking of the proofs in the case was closed by both sides in the spring of 1897, and the case was regularly set down for final hearing on its merits and stood for trial on the trial calendar of the state court on June 28, 1897.

In January, 1897, the appellant, German National Bank, was put into the hands of a receiver by order of the Comptroller of the Currency. When the case was called for final trial on its merits, on June 28, 1897, the said R. H. Courtney, as such receiver, appeared as an intervenor, and petitioned to be made a party, to which application the appellees objected. The said brief petition is in words as follows:

> "R. H. Courtney, receiver of the German National Bank, would respectfully represent unto the court that since the filing of this suit and since the filing of the last pleading herein, the German National Bank has become insolvent, and that under due and regular proceedings had in conformity with the laws of the United States, and especially in conformity with that statute commonly known as the National Bank Act, the Comptroller of the Currency has assumed charge of all the assets of the said German National Bank, and has appointed your petitioner, the said R. H. Courtney, as receiver of the said German National Bank, and of all its assets, and that he is now such receiver thereof, duly appointed and qualified, and that your petitioner, the said R. H. Courtney, receiver, desires to contest the claim of the plaintiffs

herein, and does now assert that the said claim is not a just one against the said German National Bank, and that no judgment should be rendered against it thereunder.

"Wherefore, the said petitioner, R. H. Courtney, now asks the court to require the plaintiffs to make him a party defendant herein, and upon being made such party defendant, asks to be allowed to conduct the defense herein, the said German National Bank, now being in his hands as aforesaid, and its directors having no power or authority over its assets and being, therefore, *without means to conduct the defense herein;* and your petitioner will ever pray." (Pr. Rec. 39-40.) (The italics are ours.)

The state court allowed the said petition to be filed, and immediately thereafter the said Courtney filed his petition to remove the cause to the Federal court, and moved the state court to grant such removal. The said petition for removal is in words as follows:

"Your petitioner, R. H. Courtney, receiver of the German National Bank, would respectfully represent unto the court that he has been appointed by the Comptroller of the Currency, and now is, receiver of the defendant, the German National Bank, and the said appointment was made by the said Comptroller under the laws of the United States, and especially under that law commonly called the National Bank Act; that the suit herein is one arising under the constitution and laws of the United States; that it involves largely more than $5,000. Your petitioner now presents herein this petition, and also a bond duly executed according to law, and asks that this petition be filed, said bond accepted, and that this court will proceed no further herein; and your petitioner will ever pray." (Pr. Rec. 40.)

The state court granted the said motion, to which ruling the appellees excepted.

On October 4, 1897, upon the filing of the transcript on the removal, the appellees moved to remand the case to the state court, which motion was in words as follows:

> "Come the plaintiffs and cross-plaintiffs herein and moved the court to remand this case to the state court because the facts disclosed on the face of the transcript show that it is not a removable case under the statute, and that the motion to remove to this court was made too late.
>
> "Wherefore, for these reasons and other reasons manifest on the face of the record, this cause should be remanded to the state court." (Pr. Rec. 1.)

On February 8, 1898, the court overruled this motion. Thereafter, an amended and reformed bill of complaint was filed, which was demurred to by the appellants. On October 3, 1898, the demurrer was sustained, and shortly thereafter, the appellees declining to plead further, the bill as amended was dismissed and an appeal allowed and prosecuted by the appellees to the Circuit Court of Appeals for the Sixth Circuit. (Pr. Rec. 65-68.)

The case was argued and submitted in the said Circuit Court of Appeals on October 4, 1899. On December 4, 1899, a decree was rendered by the said Circuit Court of Appeals reversing the said cause with directions to remand the same to the state court "from whence it was removed." (Pr. Rec. 70.)

A very lucid, strong and ably written opinion was delivered by the said court, which said opinion is in words and figures as follows:

No. 676.

United States Circuit Court of Appeals,

SIXTH CIRCUIT.

A. J. SPECKERT, ET AL., *Appellants*,
v.
GERMAN NATIONAL BANK, ET AL., *Appellees*.

Appeal from the United States Circuit Court for the District of Kentucky.

SUBMITTED OCT. 4, 1899.
DECIDED DEC. 4, 1899.

Before TAFT, LURTON and DAY, Circuit Judges.

Day, Circuit Judge, delivered the opinion of the court:

"On April 2, 1894, the appellants commenced this action in the Jefferson Circuit Court of Kentucky against The German National Bank and others. The bill alleged that the defendants had entered into a conspiracy to induce the complainants to subscribe to stock in the Louisville Deposit Bank, and, to that end, had made certain false and fraudulent representations in reference thereto. The Deposit Bank had become involved and its assets had been diverted, as was alleged, to pay certain debts of one Moses Schwartz, who was charged as a coconspira-

tor with the German National Bank. On January 14, 1895, the answer of the German National Bank was filed. Proofs were taken and the cause prepared for trial. In January, 1897, the German National Bank was put into the hands of a receiver, by order of the Comptroller of the Currency. On June 28, 1897, the receiver filed an application to be made a party to this suit in the state court, which application was granted, and the receiver was duly made a party to the action. Thereupon, the receiver filed a petition to remove the cause from the state court to the United States Circuit Court for the District of Kentucky. The state court made an order granting the petition and accepting the bond. October 4, 1897, on the filing of the transcript in the Circuit Court of the United States for the District of Kentucky, plaintiffs moved to remand the case to the state court. On February 8, 1898, the court overruled this motion. Thereafter an amended bill of complaint was filed, which was demurred to by the German National Bank and the receiver. On October 3, 1898, the demurrer was sustained, and upon the 15th of the same month, plaintiffs having declined to plead further, the bill was dismissed.

"Upon the appeal two questions are presented: Should the Circuit Court of the United States have maintained jurisdiction of the case? Second, should the demurrer to the bill, as reformed, have been sustained? We find it necessary to consider only the first of these questions. An elaborate and able argument has been made by counsel for appellees as to the rights of receivers of national banks to prosecute original actions in the Federal courts, and to remove cases commenced against them from the state to the Federal courts. We do not think it necessary to enter upon a consideration of the rights of receivers of national banks in such actions, and the only question presented of record which we deem it necessary to decide is whether a receiver, under the circumstances shown in this case, having been admitted as a party in the proceedings in the state court, has any right to remove the case. By the act of July 12, 1882

(22 Statutes, 162, chapter 290), cutting down the Federal jurisdiction in cases where national banks are parties, it was provided as follows:

"'That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as and not other than the jurisdiction for suits by or against banks not organized under any law of the United States, which do, or might do, banking business where such national banking associations may be doing business when such suits may be begun.'

"In Leather Manufacturers' Bank v. Cooper, 120 U. S. 779, it was held by the Supreme Court that the act of 1882 prohibited the acquiring of Federal jurisdiction by removal, as well as by original suit. See also Petri v. Commercial National Bank, 142 U. S. 644.

"Section 4 of the act of March 3, 1887, re-enacted August 13, 1888 (25 Statutes, 433; chapter 866), provides:

"'All national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between the individual citizens of the same state. The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank.'

"The effect of the act of 1882 was to place national banks, for the purpose of the jurisdiction of the courts of the United States, upon the same footing as other banking institutions in the state wherein they are located, and to prevent the removal of cases to the Federal courts by national banks because of

their organization as Federal corporations. National banks now have the same right to bring suit in the Federal court that any citizen has, and the jurisdiction of the Federal court is not enlarged in their favor, or right of removal granted to them in actions against them. It is conceded that the bank had no right to removal in this case. There is no diversity of citizenship or other grounds upon which removal could have been had by it. Had the receiver a better right of removal? In the case of The Bank of Bethel v. Bank of Pahquioque, 14 Wall. 384, it was held that a suit could be maintained by the creditor of a national bank in a state court, and that it might be prosecuted, after the failure of the bank, without making the receiver a party. In this case it is held that a creditor of a national bank may resort to a state court for an adjudication of his claim, and such adjudication is conclusive upon the receiver. In Denton v. Baker, 79 Fed. 189, it was held that while the receiver of an insolvent national bank may interpose in a suit to enforce a claim against the bank, he is not necessarily a party to the suit; that a judgment in such suit, to which he is not a party is binding upon the receiver in the absence of fraud or collusion. In National Bank of Commonwealth v. Mechanics' National Bank, 94 U. S. 437-440, it was held that claims against an insolvent bank, whose validity is established by a judgment in a court of competent jurisdiction, and claims that are proven to the satisfaction of the comptroller, stand upon the same footing. In that case a suit against the insolvent bank was sustained, although the receiver was not a party thereto. In National Bank v. Colby, 21 Wall. 609, it was held in a suit against a national bank where its property had been attached at the suit of an individual creditor that the receiver might intervene in order to discharge the attachment. In that case the corporation had been dissolved by decree of the District Court of the United States, and it was held that, in view of that fact, the suit against the bank had abated.

"We have, therefore, reached the conclusion in

the light of these authorities and the construction of the statutes applicable to this case by the Supreme Court of the United States, that the receiver, after his appointment, was a proper party to the action, and, being vested with the property of the bank and required to look after its interests with a view to the conservation and distribution of its assets was properly admitted by the state court to defend the action brought against it. While this is true, he was in no sense a necessary party, and the action would have been prosecuted without his presence, and the judgment rendered in the action would have been conclusive against him as well as the bank. The question upon which the case turns in our view is: Can a receiver, under the circumstances of this case, not being a necessary party to the action, but having been admitted to defend in the interest of his trust, remove the cause to the Federal court? In view of the decisions of the Supreme Court in analogous cases we are constrained to hold that he can not. We have not been cited to any cases exactly in point in the Supreme Court, but find adjudications establishing the proposition that one who comes voluntarily into an action is subject to the disabilities of the parties already in the case as to the right of removal. In Cable v. Ellis, 110 U. S. 389, it was held in a suit in equity involving title to real estate and priority of liens pending in a state court, where the highest court of the state had decided some of the points in controversy and had remanded the case to the court below to have other issues determined, and where one who became interested in the property by grant from one of the parties to the suit had intervened to protect his rights at a time when the right of removal had expired as to all parties, that the intervention of such party was to be regarded as incidental to the original suit and that he was subject to the disabilities resting on the party from whom he took title; and that the right of removal having expired before he intervened, his right of removal was also barred. In Houston & Texas Central Railway Co. et al. v. Shirley, 111 U. S. 358; Cable v. Ellis,

supra, was approved, and the court speaking through Mr. Chief Justice Waite, said: 'A substituted party comes into a suit subject to all the disabilities of him whose place he takes, so far as the right of removal is concerned.' See also Jefferson, trustee, v. Driver, administrator, et al., 117 U. S. 272. It is urged in the argument by counsel for appellees that these are cases where a person voluntarily comes into the suit after the right of removal has expired, and being substituted in the case, has no higher right than the original party to the suit. It is said that receivers of national banks have higher rights to stand upon than the bank itself. This may be true in some instances, yet in the present case we are not advised of any defense to the claim in question which the bank could not have made as well as the receiver. The receiver succeeds to the interest of the bank and his right to defend against this claim is no broader than that of the bank itself.

"It is also true that, under the Statutes of the United States as they now stand, the bank never had any right to the removal of the cause, and, therefore, the case is not precisely analogous to those cited, in which the Supreme Court has held that the right of removal having expired in favor of the original party, the substituted party comes into the case subject to the disabilities of him whose place he takes. But the receiver comes into an action duly prosecuted in the court of the state with all the necessary parties to a final and conclusive judgment. His presence is voluntary and not essential to a determination of the controversy. The conclusion that we reach is that the receiver, not coming into the cause as a necessary party, though properly admitted for the purpose of controlling the defense, the case involving property in which he was largely interested as a trustee, had no right of removal. The Federal Statutes giving a receiver the right to remove, apply to cases where the receiver is a necessary party to the action, whether the suit is commenced against him originally or otherwise. This decision is in harmony with a case admittedly in all respects like the one

under consideration, decided in the Circuit Court of Appeals for the Eighth Circuit, Wichita National Bank v. Smith, 72 Fed. 568. The judgment of the circuit court is reversed, and the cause remanded with directions to remand the same to the state court from whence it was removed, the receiver, out of the funds in his hands, to pay the costs in the circuit court and in this court." (Pr. Rec. 70-74.)

This opinion is reported in 98 Fed. Rep. 151, and 38 C. C. A. 682.

On January 9, 1900, an appeal was allowed from the said decree to this court, and the transcript was filed in this court January 29, 1900. (Pr. Rec. 74-76.)

The same two questions are presented in this court that were presented in the said Circuit Court of Appeals, to wit:

1. Should the Circuit Court of the United States for the District of Kentucky have maintained jurisdiction of the case notwithstanding the motions and objections of the appellees?

2. Should the demurrer of the appellants to the bill as reformed have been sustained?

ARGUMENT.

I.

THE CASE GENERALLY.

It will be seen that the Circuit Court of Appeals only considered and decided the first of the above questions, and, in view of its conclusion on that question, it was unnecessary for it to pass on the second question.

It should be further observed that neither at the date of the institution of this litigation, nor at any time thereafter, could any of the necessary parties thereto have successfully commenced the suit in, or removed it to, a Federal court; that the parties were all citizens of the same state, and the liability asserted depended on principles of general law alone, and the controversy was in no sense a separable one within the meaning of the law.

It must be further noted that the intervening petition of R. H. Courtney, receiver, to be made a party presented no new defense whatever, nor any kind of defense, except as a substitute to continue the defense that had already been filed by the German National Bank more than two years before its suspension; that neither of the other codefendants of the said bank, nor the said bank, joined or united with the said Courtney, receiver, in asking for the said removal. We claim that this failure to join in such application is as fatal to the validity of the removal on the ground that a Federal question is involved, as it would have been if the application had

been based on diversity of citizenship, and that the nature of the action and of the claim asserted at the time of the institution of the suit, and not the character of defense made thereto, constitute the true test to determine whether it arises under the laws of the United States.

We claim that the liability which is the subject matter of this action is one arising under the general law, and is not dependent either on the constitution or any law of the United States; that none of the parties impleaded as defendants to the suit ever had the right, either jointly or severally, to remove the controversy from the state to the Federal jurisdiction; that the tardy and voluntary intervention of R. H. Courtney, receiver, did not change the status of the jurisdiction as it then existed, nor amount to anything more than to allow him, as a substitute, to wear the shoes of the German National Bank in its defense against the cause of action asserted by appellees.

R. H. Courtney, receiver, was never a necessary party to the litigation, nor was he ever made a party thereto by appellees, but became a party by an order of court entered on his own motion and over the objections of appellees. (Pr. Rec. 39.) He voluntarily intervened in an action to which he was not a necessary party, and, after thus coming in as a volunteer and substitute, he is subject to all the disabilities of the German National Bank, the burden of whose continued defense he assumed, asserting in his said petition that it was "without means to further conduct its defense." The said bank never could at any time have removed the case from the state to the Federal court.

A concurrence by this court in these views, or in the opinion of the Circuit Court of Appeals for the Sixth Circuit, may dispense with the necessity of passing on the second question.

In case this court should not so concur, then we wish to submit some general observations on the second question.

In the discovery of frauds and in furnishing appropriate remedies to the parties defrauded, equity does not suffer technicalities to stand in its way, but seizes upon the substance of the case and holds all guilty parties liable to account, following trust property into the hands of remote grantees and persons who have taken it with notice of the trust impressed on it.

The funds diverted in this case did not technically belong to the creditors and stockholders, but to the Louisville Deposit Bank in trust, however, for their use and benefit. The latter and its assignee were technically the sufferers by the loss sustained, and the right to sue therefor was primarily vested in the said assignee.

It is true that the creditors and stockholders, as the cestuis que trust, suffer if the corporation as their legal trustee neglected or refused to sue, but they could not sue until they had first substantially complied with the provisions of equity rule 94 of this court.

If the corporation or its assignee had, in good faith, first sued for the redress of these grievances, then the shareholders could not have maintained either a joint or a separate action against the appellants therefor.

It is, however, made perfectly manifest in this case that, before instituting this action, the appellees com-

plied with all of the precedent conditions to have the suit brought by the assignee of the said Deposit Bank. (Pr. Rec. 55-56.)

It is made to appear that the said assignee was then under the complete domination and control of the German National Bank, having the same president and six out of a total of nine of the same directors, and that a demand was made upon it and refused.

Being thus under the control of the alleged conspirators, it could not reasonably be expected to sue, and the demand proved to be an idle ceremony. Hence, the beneficiaries, whose assets had thus been spoliated, brought this action in equity, because their rights were purely derivative and equitable.

They had the right to sue for themselves and all others entitled to participate in the spoliated assets, and their bill, as reformed and amended, was not multifarious. This court has substantially stated the rule on this point to be as follows:

> "There is not any positive and inflexible rule as to what, in the sense of a court of equity, constitutes multifariousness which is fatal to a suit on demurrer. * * * The different portions or shares into which the subject may be divisible amongst themselves must be considered. * * * Where they seek an account and the recovery of a subject claimed by their common title, or an equivalent for the subject, against parties charged with having, by fraudulent combination, withheld and diverted that subject, and by such combination and diversion rendered themselves equally, jointly and severally, liable therefor, the bill is not multifarious." Shields v. Thomas, 18 How. 260.

This rule seems to fit our case. The object of the appellees was to trace and secure restitution of a spoliated trust fund. They asked for the appointment of a receiver, and an accounting, to more effectually determine and harvest the fund, and then to have the same distributed amongst those entitled thereto, accordingly as they might be entitled to participate therein. As all of them claimed interests therein, first, as creditors, and next as stockholders, of course, the fund recovered should not be distributed without those interested being parties to the distribution.

It is next insisted that the matters complained of were *ultra vires*, the charter of the German National Bank. We think it has become a settled principle of this court that national banks are liable for the acts of their servants, while engaged in the business of their employment, in the same manner and to the same extent that individuals are liable under like circumstances.

Even as to confessedly *ultra vires* transactions, the rule has been stated by this court to be as follows:

> "The courts have always striven to do justice between the parties, so far as could be done consistently with law, by permitting property or money parted with on the faith of an unlawful contract to be recovered back, or compensation to be made for it."
>
> Transp. Company v. Pullman Company, 139 U. S. 60.
> Pullman Company v. Transp. Company, 171 U. S. 151.

The authorities accord with reason and justice, and conduce to show that national banks can not retain the proceeds of an unlawful act, and escape an accounting in equity and restitution on the plea that it was *ultra vires*.

II.

JURISDICTION.

We claim that the decree of the Circuit Court of Appeals should be affirmed, and wish to submit some propositions and authorities in support of this contention.

1. That in order to remove a cause from a state to a Federal court, on the ground that a federal question is involved, where the controversy is not a separable one, all the defendants must unite in the application for removal. In this case the receiver alone applied for the removal. He was not a party until nearly thirty-nine months after the commencement of the suit, and, then, only became a party by virtue of his voluntary and unnecessary intervention. Neither the German National Bank nor any of its alleged coconspirators, sued as codefendants with it, ever united with the said Courtney, as receiver, in any application for the removal of the case.

The recent case of Chicago, Rock Island & Pacific Railroad Co. v. Martin, 178 U. S. 245, appears to us to be decisive of this point. That was a suit filed January 26, 1894, by one Martin against the said railroad company, and the receivers of the Union Pacific Railway Company, in the District Court of Clay County, Kansas, to recover

for personal injuries, alleging that the said defendants, jointly, caused the death of plaintiff's intestate.

On February 14, 1894, the first named defendant filed its separate answer. On February 20, 1894, the receivers of the Union Pacific Railway Company filed their petition and bond, praying for a removal of the cause to the Federal court, on the ground that they derived their authority from, and were appointed receivers by, the decrees of the Circuit Court of the United States, for the Districts of Nebraska and Kansas, in which they were ordered to take charge of and operate the said Union Pacific Railway Company, and that while thus engaged in operating it, the injuries complained of occurred, and that, as to them, the suit was one arising under the laws of the United States. The District Court of Clay County, Kansas, denied their application, and, upon the trial, a verdict was rendered against all of the defendants, for $10,000. The cause was taken, on error, to the Supreme Court of Kansas, and the judgment was affirmed by that court. (59 Kans. 437.)

It was then, by writ of error, brought to this court, and the sole question considered was "whether it was necessary for the Chicago, Rock Island & Pacific Railroad Company, defendant, to join in the application of its co-defendants, the receivers, to effect a removal." After due consideration of the language of the statute, and after applying thereto the previous decisions of this court, the conclusion was reached, that, in the absence of a separable controversy, all of the defendants must join in the application for removal, whether it be predicated on a federal question, or on a diversity of citizenship.

The Supreme Court of Kansas, in passing on the question (59 Kans. 447), said:

> "Our own construction of the Federal Statute, on the subject, is that it was necessary for both defendants to join in the petition for a removal. They were charged with jointly causing the death of the plaintiff's intestate.
>
> "The controversy was not separable, and the receivers, alone, had no right to removal on the ground that a Federal question was involved. No Federal question was in fact presented by the pleadings, nor litigated at the trial. It was the ordinary action under our statute for wrongfully causing the death of the plaintiff's intestate."

It can be truthfully asserted that substantially the same state of case exists here.

This court, in affirming this conclusion of the Supreme Court of Kansas, among other things, said:

> "There was no separable controversy here. The case presented a joint cause of action against all the defendants, and the removal was applied for on the ground that the suit arose under the Constitution and laws of the United States. It, therefore, came within the first clause of the section quoted, and, if the same rule governs proceedings under that clause, that obtains in respect of the second clause, the judgment of the Supreme Court of Kansas must be affirmed. *And in view of the language of the statute, we think the proper conclusion is that all the defendants must join in the application under either clause.*" (Our italics.)

And again, further on in said opinion, this court said:

> "No Federal question was in fact presented by the pleadings nor litigated at the trial. The liability

depended on principles of general law applicable to the facts, and not in any way upon the terms of the order appointing the receivers. Whatever the rights of the receivers to remove the cause, if they had been sued alone, the controversy was not a separable controversy within the intent and meaning of the act. This being so, the case came solely within the first clause of the section, and we are of the opinion that it was not intended by Congress that, under such circumstances, there should be any difference between the rule applied under the first and second clauses of Section 2 of the Act of 1887-8."

This conclusion was anticipated and it logically followed the previous decisions of this court. See,

Hanrick v. Hanrick, 153 U. S. 192.
Torrence v. Shedd, 144 U. S. 527.
Whitcomb v. Smithson, 175 U. S. 635.
Water Co. v. Keyes, 96 U. S. 199.
Blackburn v. Mining Co., 175 U. S. 571.
Leather Mfg. Bank v. Cooper, 120 U. S. 779.
Petri v. Com. National Bank, 142 U. S. 644.
Bank of Bethel v. Bank of Pahquioque, 14 Wall. 384.

Since the rendition of the above opinion, it has been approved and followed in the following cases, among others:

Gableman v. Peoria Ry. Co., 101 Fed. Rep. 1, which has been affirmed by this court during the present term; 21 Sp. Ct. Rep. 171.
Yarnell v. Felton, 104 Fed. Rep. 161.

2. That since July 12, 1882, national banking associations have occupied the same federal jurisdictional status as state banks located in their respective domiciliary

states, and have possessed no other nor greater right of removal than that possessed, under similar circumstances, by such state banks. See,

22 U. S. Stat. 162, Chap. 290.
24 U. S. Stat. 552, Chap. 373.
25 U. S. Stat. 433, Chap. 866.
72 Fed. Rep. 568 (19 C. C. A. 42), Wichita National Bank v. Smith.
98 Fed. Rep. (38 C. C. A. 682), Speckert v. Ger. Nat. Bank.
164 U. S. 691, ex parte Jones.
142 Fed. Rep. 644, Petri v. Com. Nat. Bank.
134 U. S. 527, Whittemore v. National Bank.
132 U. S. 141, National Bank v. Morgan.
120 U. S. 778, Leather Nat. Bank v. Cooper.

3. That the appointment of a receiver by the comptroller, under Section 5234, U. S. Rev. Stat., pending litigation against such bank in the state court, does not arrest nor affect the competent jurisdiction of the state court to proceed with the case to judgment without the receiver being made a party, and that the judgment so rendered therein against the bank, in the absence of fraud or collusion, is such an adjudication of the liability as was contemplated by Section 5236 of the U. S. Rev. Stat., and is as conclusive, in the absence of the receiver as a party, as it would have been if he had been formally made a party upon his appointment. It would have been an adjudication by a court of competent jurisdiction within the meaning of Section 5236, supra. The jurisdiction of the state court, having once become fixed, could not be affected by the supervenient insolvency of the bank. In other words, the receiver is merely the statutory assignee

of the bank for the specific purposes named in the statute. The corporation is not dissolved by his appointment. The contracts and liabilities, existing at the time of his appointment, between the bank and others, continue to subsist, and a final judgment against the bank thereon, rendered by a state court of competent jurisdiction, would necessarily and conclusively establish the existence and extent of the liability, and be as binding on the receiver as on the bank.

14 Wall. 383, Bank of Bethel v. Pahquioque Bank.
79 Fed. Rep. 189 (24 C. C. A. 476), Denton v. Baker.
8 Wall. 506, Kenredy v. Gibson.
17 Wall. 19, Bank v. Kennedy.
21 Wall. 609, Bank v. Colby.
94 U. S. 440, National Bank v. Mechanic's National Bank.
173 U. S. 113, Bausman v. Dixon.
21 Sp. Ct. Rep. 109, Baggs v. Martin.

4. That the receiver, not being a necessary party, but coming voluntarily into a pending suit against the bank, becomes an agent or substitute for the bank, and as such comes into the suit subject to all of the disabilities of his principal, the bank, whose place he takes, so far as the right of removal is concerned.

110 U. S. 389, Cable v. Ellis.
111 U. S. 358, R. R. Co. v. Shirley.
117 U. S. 274, Jefferson v. Driver.
122 U. S. 535, Hedge Co. v. Fuller.
53 Fed. Rep. 162, Burnham v. Bank.
38 Fed. Rep. 213, Jarboe v. Templer.
59 Fed. Rep. 727, Ry. Co. v. Twitchall.
67 Fed. Rep. 4, Wagon Works v. Benedict.

5. That this is a suit against several persons jointly involved with the bank in an unlawful combination and conspiracy to defraud the complainants, and is not susceptible of division into separable controversies by the defendants. The cause of action is the subject matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiffs declared it to be in their pleadings. That a Federal question, in order to constitute a ground of removal, must affirmatively appear on the face of the plaintiff's complaint, and its absence can not be supplied by any statement in the subsequent pleadings or in the petition for removal. That the case had been pending in the state court several years, with all of the necessary parties to a final and conclusive judgment, before the receiver voluntarily intervened, and that the receiver, not being a necessary party to the action, could not divest the state court of jurisdiction by his voluntary and unnecessary intervention.

21 Supreme Court Rep. 67, C & O. Ry. Co. v. Dixon.
144 U. S. 527, Torrence v. Shedd.
175 U. S. 635, Whitcomb v. Smithson.
167 U. S. 57, Walker v. Collins.
165 U. S. 624, Wade v. Lawder.
155 U. S. 482, Postal Tel. Co. v. Alabama.
152 U. S. 454, Tennessee v. Bank of Commerce.
155 U. S. 102, Chappell v. Waterworth.
115 U. S. 41, Pirie v. Tvedt.
116 U. S. 408, Fletcher v. Hamlet.
117 U. S. 275, Sloane v. Anderson.
132 U. S. 599, L. & N. R. R. Co. v. Wangelin.
178 U. S. 245, Chicago, &c., R. R. Co. v. Martin.
169 U. S. 92, Powers v. C. & O. R. R. Co.
156 U. S. 335, Connell v. Smiley.

6. The question naturally suggests itself that, if by reason of the petition for removal, filed by Courtney, receiver, on June 28, 1897, the Circuit Court of the United States, for the District of Kentucky, acquired jurisdiction, then to what extent did that jurisdiction extend? Did it embrace the entire controversy and carry with it all of the necessary parties defendant, notwithstanding their failure to join in the petition and application for the removal? If not, then, how much of the controversy, and over what parties, did the state court still retain jurisdiction? Is it possible, under the Act of 1887-8, that any one whose presence as a party is not necessary to a final and conclusive adjudication of the controversy, can voluntarily intervene in a state court suit, at any stage thereof, and, without even tendering any defense, stop the entire machinery of the state court by removing the entire controversy to the Federal jurisdiction? We have, we think, heretofore shown that there was no separable controversy in this case, and that the cause of action is jointly against the German National Bank, Adolph Reutlinger, Albert Reutlinger and Moses Schwartz. Neither one of the said four named parties joined in the application of the said Courtney, receiver, for a removal. If there be a separable controversy, the suit is still pending in the state court against those whom the complainants seek judgment. We, therefore, have an anomalous case presented of an unnecessary and voluntary intervenor, by petition to be made a party, filed more than three years after the institution of the suit, and who upon being made a party by the court, over the objections and protests of complainants, moves the entire controversy from the state to the

federal judiciary. We respectfully sumbit that this can not be rightfully done. The only two states of case under the National Currency Act, of which the federal judiciary have exclusive jurisdiction, are provided for in Sections 5237 and 5239 of the U. S. Rev. Stat., and are as follows:

Firstly. Suits brought by the comptroller, in the nature of *quo warranto* against such bank to enforce a forfeiture of its franchise; and,

Secondly, suits brought by national banks against the comptroller to enjoin the receivership.

In all other cases the jurisdiction of the state courts is full and complete. Since July 12, 1882, the jurisdiction of the state courts has been exclusive of the Federal courts, where the parties are citizens of the same state, and where no Federal question was involved on the face of the complaint.

We, therefore, confidently submit that the decree of the Circuit Court of Appeals of the Sixth Circuit, appealed from herein was correct and should be affirmed.

III.

THE CIRCUIT COURT FOR THE DISTRICT OF KENTUCKY ERRED IN SUSTAINING THE DEMURRER TO THE BILL AS REFORMED AND AMENDED.

We scarcely deem it necessary, in view of our convictions on the jurisdictional question, to elaborate our views on the demurrer. We believe that this court will find it unnecessary to consider this question. If, how-

ever, this court should disagree with the Circuit Court of Appeals for the Sixth Circuit, then, and then only, will it become necessary to consider this branch of the case. We wish, however, to briefly submit the following points and authorities on this branch of the case:

1. The bill is not multifarious.

2 How. 642, Gaines v. Chew.
18 How. 261, Shields v. Thomas.
128 U. S. 410, Brown v. Guaranty Company.
86 Fed. Rep. 219, Fig Syrup Co. vs. Worden.
Daniels Chancery Practice, Vol. 1 (6th Ed.), 334.

2. There exists no adequate remedy at law.

6 Allen (Mass.), 56, Peabody v. Flint.
91 N. Y. 451, Barr v. Railroad Co.
10 Bush, 660, Jones v. Johnson.
18 How. 331, Dodge v. Woolsey.
104 U. S. 450, Hawes v. Oakland.
6 L. R. Eng. & Ir. App. Cases, 337, Peak v. Gurney.
2 Atk. 400, Charitable Corporation v. Sutton.

3. The matters complained of and set forth in the reformed bill of complaint are not *ultra vires*.

10 Wall. 604, Merchants' Nat'l Bank v. Nat'l Bank.
100 U. S. 699, Nat'l Bank v. Graham.
59 Fed. Rep. 338, Nevada Bank v. Portland Nat'l Bank.
69 Fed. Rep. 919, Varnish Co. v. Nat'l Bank.
77 Fed. Rep. 91, Nat'l Bank v. Wall Paper Co.
118 U. S. 256, Salt Lake v. Hollister.
122 U. S. 597, Ry. Co. v. Harris.
21 How. 209, Railroad Co. v. Quigley.

98 Fed. Rep. 562 (39 C. C. A. 1; 48 L. R. A. 210), Hindman v. First National Bank.
172 U. S. 534, Gas Light Co. v. Lansden.
139 U. S. 60, Central Transp. Co. v. Pullman Car Co.
171 U. S. 151, Pullman Car Co. v. Central Transp. Co.

I.

In Gaines v. Chew, supra, this court stated the rule as follows:

> "Whilst parties should not be subjected to expense and inconvenience in litigating matters in which they have no interest, multiplicity of suits should be avoided, by uniting in one bill all who have an interest in the principal matter in controversy, though the interest may have arisen on distinct contracts"; following and quoting from the opinion of Lord Cottenham, in Cambell v. Mackay, 1 Mylne & Craig, 603.

We have already quoted the rule as stated by this court in Shields v. Thomas, 18 How. 261.

All of the appellees have an interest in the subject claimed by their common title against the appellants, who are charged with having by fraudulent combination withdrawn and diverted that subject from its proper channels. The object of the bill is to reclaim and harvest the sums so fraudulently diverted, and to have the chancellor distribute the same amongst those entitled thereto, according to their several rights. We insist that the bill is not multifarious.

II.

Lord Hardwicke, in the great leading case of Charitable Corporation v. Sutton, supra, aptly said:

> "The courts of this kingdom are wisely formed of both courts of law and equity, and so are the tribunals of most other nations, and for this reason there can be no injury, but there must be a remedy, in all or some of them; and, therefore, I will never determine that frauds of this kind are out of the reach of courts of law or equity, for an intolerable grievance would follow from such a determination."

The right to maintain this action in the form in which it was instituted is purely equitable. The stockholders did not have the right to sue until they had first complied with the provisions of Rule 94, of this court, and the principles laid down in the case of Hawes v. Oakland, supra. And suing as they did, as the substitute for the injured corporation, they could only sue in equity, because their rights, in that respect, were equitable only. It does not matter if the action be founded upon a tort, as the shareholders had no right to sue except in equity.

It is a general rule that every actionable wrong gives to the persons injured a cause of action, and where this cause of action rests primarily in the injured corporation, which declines to sue, its stockholders, as the beneficiaries of the spoliated assets of the corporation, would have no right to sue, except in equity. They must either sue in equity, or they will be without remedy.

As between the corporation and its stockholders, the corporation is a trustee and its stockholders as cestuis que trust have a joint interest in all of its property and effects, which the courts will protect.

The objection that a court of equity has no power to furnish a remedy in a case of this character seems to us utterly untenable. We think the authorities above cited sustain our position.

III.

This court has decided, in the cases cited, supra, affecting national banks, as follows:

> "Corporations are liable for every wrong for which they are guilty, and, in such case, the *ultra vires* have no application. Corporations are liable for the acts of their servants, while engaged in the business of their employment, in the same manner and to the same extent that individuals are liable under like circumstances." (10 Wall. 604.)

Again this court said in National Bank v. Graham, supra:

> "An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the object of its creation, or beyond its granted powers. It may be sued for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance and for libel."

And in the case of Railway Company v. Quigley, 21 How. 202 this court said:

> "The result of the cases is, that for acts done by the agents of a corporation, either in contractu or in delicto, in the course of its business and of their employment, the corporation is responsible, as an individual is responsible under similar circumstances."

And again, in Gas Light Company v. Lansden, 172 U. S. 534, this court said:

> "The result of the authorities is, as we think, that, in order to hold a corporation liable for the torts of any of its agents, the act in question must be performed in the course and within the scope of the

> agent's employment in the business of the principal. The corporation can be held responsible for acts which are not strictly within the corporate powers, but which were assumed to be performed for the corporation and by the corporate agents who were competent to employ the corporate powers actually exercised."

In this case the acts of the German National Bank, through its president and cashier, were within the scope of their employment, and for the benefit of the said German National Bank. We, therefore, respectfully submit that the said acts were not *ultra vires*. But even if this court should be of the opinion that they were, in a certain sense, *ultra vires*, still the principles laid down in the Palace Car Company cases apply, where the court said:

> "The courts have always striven to do justice between the parties, so far as could be done consistently with law, by permitting property or money parted with on the faith of an unlawful contract to be recovered back or compensation to be made for it."

It will be readily seen from the bill as amended that an accounting is sought between the complainants and the said conspirators to the end that, in any aspect of the case, they should be compelled to make restitution of the unlawful gains resulting from the said conspiracy.

Respectfully submitted,

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J. C. DODD,
Of Counsel.

Supreme Court of the United States.

No. 192.—October Term, 1900.

The German National Bank et al., Appellants, *vs.* A. J. Speckert, Jacob Frankel, Harriet Frankel, et al.	Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

[May 13, 1901.]

Mr. Justice Gray delivered the opinion of the Court.

This was a bill in equity, commenced in a court of the State of Kentucky, and removed, on petition of the defendant, into the Circuit Court of the United States for the District of Kentucky. The Circuit Court of the United States denied a motion to remand the case to the State court, (85 Fed. Rep. 12,) and afterwards dismissed the bill upon its merits. The plaintiff appealed to the Circuit Court of Appeals, which reversed the decree and ordered the Circuit Court to remand the case to the State court. 98 Fed. Rep. 151; 38 C. C. A. 682. From the order of the Circuit Court of Appeals the plaintiffs appealed to this court.

In *Railroad Co.* v. *Wiswall*, (1874) 23 Wall. 507, a case was removed from a State court into a Circuit Court of the United States; the Circuit Court, being satisfied that it had no jurisdiction, ordered the case to be remanded to the State court; and a writ of error to review the order remanding it was dismissed by this court, upon the ground that "the order of the Circuit Court remanding the cause to the State court is not a 'final judgment' in the action, but a refusal to hear and decide. The remedy in such a case is by mandamus to compel action, and not by writ of error to review what has been done."

By the act of March 3, 1875, c. 137, § 5, it was provided that an order of the Circuit Court, dismissing or remanding a cause to the State court, should be reviewable by this court on writ of error or appeal. 18 Stat. 472. Under that statute, many cases were brought to this court by appeal or writ of error for the review of such orders.

But by section 6 of the act of March 3, 1887, c. 373, as reënacted by the act of August 13, 1888, c. 866, that provision was expressly repealed; and by section 2 it was enacted that whenever the Circuit Court of the United States should decide that a cause had been improperly removed, and order it to be remanded to the State court from which it came, "such remand shall be immediately carried into execution, and no appeal or writ of error

from the decision of the Circuit Court so remanding such cause shall be allowed." 24 Stat. 553, 555; 25 Stat. 435, 436.

Under that statute, it has been constantly held that this court has no power to review by appeal or writ of error an order of a Circuit Court of the United States remanding a cause to a State court.

In the first case Chief Justice Waite said: "It is difficult to see what more could be done to make the action of the Circuit Court final, for all the purposes of the removal, and not the subject of review in this court. First, it is declared that there shall be no appeal or writ of error in such a case, and then, to make the matter doubly sure, the only statute which ever gave the right of such an appeal or writ of error is repealed." *Morey* v. *Lockhart*, (1887) 123 U. S. 56. And it was held that the act prohibited a writ of error after that statute took effect to review an order of remand made while the act of 1875 was in force. *Sherman* v. *Grinnell*, (1887) 123 U. S. 679.

By the act of February 25, 1889, c. 236, it was provided that "in all cases where a final judgment or decree shall be rendered in a Circuit Court of the United States, in which there shall have been a question involving the jurisdiction of the court," the losing party should be entitled to an appeal or writ of error to this court, without reference to the amount of the judgment, but limited, when that amount did not exceed $5000, to the question of jurisdiction. 25 Stat. 693. It was held that this act did not authorize an appeal from an order of the Circuit Court of the United States remanding a case to the State court for want of jurisdiction, because "the words 'a final judgment or decree,' in this act, are manifestly used in the same sense as in the prior statutes which have received interpretation, and these orders to remand were not final judgments or decrees, whatever the ground upon which the Circuit Court proceeded." *Richmond & Danville Railroad* v. *Thouron*, (1890) 134 U. S. 45. A similar decision was made in *Gurnee* v. *Patrick County*, (1890) 137 U. S. 141.

In the case of *In re Pennsylvania Co.*, (1890) 137 U. S. 451, it was held that the acts of 1887 and 1888 took away the remedy by mandamus, as well as that by writ of error or appeal, in the case of an order of remand; and Mr. Justice Bradley, in delivering judgment, after quoting section 2 of those acts, said: "In terms, it only abolishes appeals and writs of error, it is true, and does not mention writs of mandamus; and it is unquestionably a general rule, that the abrogation of one remedy does not affect another. But in this case we think it was the intention of Congress to make the judgment of the Circuit Court remanding a cause to the State court final and conclusive. The general object of the act is to contract the jurisdiction of the Federal courts. The abrogation of the writ of error and appeal would have had little effect in putting an end to the question of removal, if the writ of mandamus could still have been

sued out in this court. It is true that the general supervisory power of this court over inferior jurisdictions is of great moment in a public point of view, and should not, upon light grounds, be deemed to be taken away in any case. Still, although the writ of mandamus is not mentioned in the section, yet the use of the words 'such remand shall be immediately carried into execution,' in addition to the prohibition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process. We are, therefore, of opinion that the act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error." 137 U. S. 454.

In *Chicago Railway* v. *Roberts*, (1891) 141 U. S. 690, the cases of *Morey* v. *Lockhart* and *Richmond & Danville Railroad* v. *Thouron* were followed; and it was held that section 5 of the Judiciary Act of March 3, 1891, c. 517, giving a writ of error from this court "in any case in which the jurisdiction of the court is in issue," does not authorize a writ of error to review an order of the Circuit Court, remanding a case for want of jurisdiction, because such order is not a final judgment.

In *Missouri Pacific Railway* v. *Fitzgerald*, (1896) 160 U. S. 556, 580–583, in a careful opinion of the Chief Justice, reviewing the statutes and decisions, it was again stated, as well settled, that an order of the Circuit Court of the United States ordering a suit to be remanded to the State court was not a final judgment or decree; and that such an order could not be reviewed in this court by any direct proceeding for that purpose; and it was also held that "as under the statute a remanding order of the Circuit Court is not reviewable by this court on appeal or writ of error from or to that court, so it would seem to follow that it cannot be reviewed on writ of error to a State court, the prohibition being that 'no appeal or writ of error from the decision of the Circuit Court remanding such cause shall be allowed.' And it is entirely clear that a writ of error cannot be maintained under section 709, in respect of such an order, where the State court has rendered no decision against a Federal right, but simply accepted the conclusion of the Circuit Court."

In the present case, the remand to the State court was denied by the Circuit Court of the United States, but, on appeal from its decree dismissing the bill, was ordered by the Circuit Court of Appeals.

If the Circuit Court had ordered the case to be remanded, its order could not, according to the decisions above cited, have been reviewed by this court, in any manner, either by appeal from that court, or by mandamus to that court, or by writ of error to the State court.

It would be an extraordinary result if, while an order of remand by the Circuit Court, of its own motion, is not subject to review in any form, an order of remand by that court, by direction of the Circuit Court of Appeals, were subject to a further appeal to this court.

The appeal in this case is taken under the last paragraph of section 6 of the act of March 3, 1891, c. 517, by which "in all cases not hereinbefore in this section made final," and when the matter in controversy exceeds $1000, there is of right a review of the judgment of the Circuit Court of Appeals by this court on appeal or writ of error.

Such appeal or writ of error, of course, can only be taken from a final judgment. But an order of remand is not a final judgment, according to the cases above cited, especially *Railroad Co.* v. *Wiswall*, *Richmond & Danville Railroad* v. *Thouron*, *Chicago Railway* v. *Roberts*, and *Missouri Pacific Railway* v. *Fitzgerald*. Therefore no appeal lies from the order of remand.

Appeal dismissed for want of jurisdiction.

True copy.

Test:

Clerk Supreme Court, U. S.